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SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1951

No. 143

VERNA LEIB SUTTON, PETITIONER,

vs.

R. WELLS LEIB

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 23, 1951.

CERTIORARI GRANTED OCTOBER 15, 1951.

In the
United States Court of Appeals
For the Seventh Circuit

No. 10294

VERNA LEIB SUTTON,

Plaintiff-Appellant,

vs.

R. WELLS LEIB,

Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Illinois, Southern Division.

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1 Pleas in the District Court of the United States of America within and for the Southern Division of the Southern District of Illinois, held in the City of Springfield, in said Division and District, before the Honorable Charles G. Briggle, Judge of said Court, on Monday the second day of January, in the year of our Lord one thousand nine hundred and fifty, and of the Independence of the United States of America, the one hundred and seventy-fourth.

Present:

Charles G. Briggle, District Judge.
Robert Grant, United States Marshal.
Howard L. Doyle, United States Attorney.
G. W. Schwaner, Clerk.

Attest:

G. W. Schwaner,
Clerk.

2 IN THE DISTRICT COURT OF THE UNITED STATES
For the Southern District of Illinois,
Southern Division.

Verna Leib Sutton,
Plaintiff-Appellant,
vs.
R. Wells Leib,
Defendant-Appellee. } Civil Action
 } No. 1134

STATEMENT IN ACCORDANCE WITH RULE 10(b)
OF RULES OF THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT.

Commencement of Suit—Complaint Filed April 12, 1950.

Names of Parties—Set forth in Title of Case Above.

Motion to Dismiss—Filed May 1, 1950.

Reply to Motion to Dismiss—Filed May 29, 1950.

Amendment of Motion to Dismiss by Addition of Prayer
for Summary Judgment—Filed June 5, 1950.

**Cause submitted on Defendant's Amended Motion and
Taken Under Advisement—June 16, 1950—By Honorable
Charles G. Briggle, U. S. District Judge.**

Opinion of Honorable Charles G. Briggle—Filed August 21, 1950.

Judgment Order (Judgment against Plaintiff and for Costs)—Filed August 21, 1950.

Motion by Plaintiff for a New Trial—Filed August 22, 1950.

Suggestions in Objection to Motion by Plaintiff for a
New Trial—Filed August 28, 1950.

Motion by Plaintiff for a New Trial Denied—Filed September 5, 1950.

Notice of Appeal—Filed October 3, 1950.

3 IN THE DISTRICT COURT OF THE UNITED STATES.
* * * (Caption—1134) * * *

Be It Remembered that heretofore to wit: on the 12th day of April, in the year of our Lord one thousand nine hundred and fifty, that being one of the days of the January Term, A. D. 1950 of the District Court of the United States for the Southern Division of the Southern District of Illinois, there was filed in the office of the Clerk of said court, a certain Complaint, which said Complaint was and is in the words and figures, following, to wit:

4 IN THE UNITED STATES DISTRICT COURT.
* * * (Caption—1134) * * *

Now Comes The Plaintiff, Verna Leib Sutton, by F. T. Carson Law Offices, Joseph R. Carson, of counsel, and states:

1. That the plaintiff is a resident and citizen of the State of New York, and the defendant is a resident and citizen of the State of Illinois, and the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand (\$3,000.00) Dollars.
2. That the plaintiff and defendant were lawfully united in marriage on the 25th day of June A. D. 1924, in the City of Jacksonville, Illinois.
3. That the plaintiff filed a complaint for divorce against the defendant herein in the Circuit Court of Sangamon County, State of Illinois, in October, A. D. 1939, and that a decree of divorce was granted to the plaintiff herein by said Court on the 11th day of October, A. D. 1939, a copy of which decree is hereto attached and annexed as Exhibit "A".
4. That by the terms of said Decree of Divorce, the defendant, R. Wells Leib, was ordered to pay to the plaintiff the sum of One Hundred Twenty-Five (\$125.00) Dollars on or before the first day of each calendar month after the date of the entry of said Decree for so long as the plaintiff remained unmarried, or for so long as said Decree remained in full force and effect, unaltered and unmodified.

4
Complaint.

5. That said Decree of Divorce has at no time been altered or modified.

6. That the defendant, R. Wells Leib, made said payments to the plaintiff as provided in said decree until to-wit the 1st day of August, A. D. 1944, at which time said defendant ceased to make said payments, and that he has made no payments to the plaintiff since that date.

7. That the plaintiff was lawfully married to one Sherwood Sutton on the 21st day of November, A. D. 1947.

8. That there is due and owing to the plaintiff from the defendant all payments as provided in the said Decree of Divorce from the 1st day of August A. D. 1944 to the 21st day of November, A. D. 1947, which consists of forty (40) monthly payments of \$125.00 each, making a total of Five Thousand (\$5,000.00) Dollars, plus interest thereon.

Wherefore, the plaintiff, Verna Leib Sutton, prays judgment against the defendant, R. Wells Leib, in the sum of Five Thousand (\$5,000.00) Dollars, plus interest thereon and the costs of this proceeding.

Verna Leib Sutton,

Plaintiff,

By Francis T. Carson Law Office,

By Joseph R. Carson,

Of Counsel,

Her Attorney.

F. T. Carson Law Offices,
Joseph R. Carson, *Of Counsel*,
102 E. Main St.,
Urbana, Illinois.

Exhibit "A".

State of Illinois, { ss.
Sangamon County,

IN THE CIRCUIT COURT OF SAID COUNTY,

October, 1939.

Verna Lee Leib, { Plaintiff, Complaint for Divorce
vs. { No. _____
R. W. Leib, { Defendant. In Equity.

DECREE.

And now this matter coming on to be heard, and it appearing to the Court that the Defendant, R. W. Leib, has entered his appearance in writing to this cause and has waived service of process upon him, and thereupon, on motion of plaintiff's attorneys, the said defendant was ordered to file his Answer to said Complaint on or before the 11th day of October, A. D. 1939, at nine o'clock A. M., and the defendant having answered said Complaint by Jerome R. Finkle, his attorney; and now this matter again coming on to be heard upon said Complaint and Answer, and the Court having heard the evidence of witnesses produced, sworn and examined in open court, heard the arguments of counsel, and being fully advised in the premises, on consideration thereof, doth find: That this Court has jurisdiction of the parties to and the subject matter of this suit; that the plaintiff is now and was for more than one year immediately prior to filing her Complaint in this cause a resident of the City of Springfield, in the County of Sangamon and State of Illinois; that the plaintiff and defendant were lawfully united in marriage on the 25th day of June, A. D. 1924, in the City of Jacksonville, Illinois; that the defendant is guilty of extreme and repeated cruelty in the manner and form as charged in said Complaint; that the equities of this cause

Complaint.

7 are with the plaintiff, and that the parties hereto have settled and adjusted the property rights between them.

It is therefore Ordered, Adjudged and Decreed by the Court that the marriage between the plaintiff and the defendant is hereby dissolved, and the parties hereto, and each of them are hereby forever freed from any and all of the obligations thereof; that the property settlement between the parties shall be, and it is hereby approved, and from and after this date neither of the parties hereto shall have any right, title or interest in or claim to the property, real or personal, of the other, whether owned by either of them now or hereafter acquired; that the defendant shall on or before the first day of each calendar month hereafter pay to the plaintiff the sum of One Hundred Twenty-five Dollars (\$125.00) for so long as the plaintiff shall remain unmarried, or for so long as this decree remains in full force and effect, unaltered and unmodified.

It is further Ordered that the defendant pay the costs and charges of this proceeding.

Dated at Springfield, Illinois, this 11th day of October,
A. D. 1939.

Enter:

Victor Hemphill,
Circuit Judge.

Indorsed: Filed Apr. 12, 1950. G. W. Schwaner, Clerk.

8 And afterwards, to wit: on the 12th day of April, A. D. 1950, there was issued by the Clerk of said court a certain Summons, which said Summons, together with the Marshal's Return thereon, was and is in the words and figures, following, to wit:

9 UNITED STATES DISTRICT COURT.
* * * (Caption—1134) * * *

SUMMONS.

To the above named Defendant:

You are hereby summoned and required to serve upon Howard Ralph Blalock, plaintiff's attorney, whose address is 1404 S. 11th St., Springfield, Illinois, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

G. W. Schwaner,
Clerk of Court,
By Clara B. Reisch,
Deputy Clerk.

(Seal)

Date: April 12th, 1950, Springfield, Illinois.

Indorsed, Filed April 17, 1950. G. W. Schwaner, Clerk.

Return On Service Of Writ.

I hereby certify and return, that on the 14th day of April, 1950, I received this summons and served it together with the complaint herein as follows: By delivering a copy of the within summons together with a copy of Complaint thereof to the within-named R. Wells Leib at 908 Ridgely Building, Springfield, Illinois this 14th day of April, 1950.

Robert Grant,
United States Marshal,
By Elmer W. Schultz,
Deputy United States Marshal.

Marshal's Fees.
Travel : \$.12
Service : 2.00

\$2.12

Note.—Affidavit required only if service is made by a person other than a United States Marshal or his deputy.
U. S. Marshal's No. 8389, Vol. 9, Page 341.

10 And afterwards, to wit: on the 1st day of May, A. D. 1950, there was filed in the office of the Clerk of said Court, a certain Motion to Dismiss, which said Motion was and is in the words and figures, following, to wit:

11 IN THE UNITED STATES DISTRICT COURT.
• • • (Caption—1134) • • •

MOTION TO DISMISS.

Now comes the defendant, R. Wells Leib, by A. M. Fitzgerald, his solicitor, and enters his appearance specially and solely for the purpose of challenging the jurisdiction of this court, and for want of such jurisdiction respectfully moves the court that the complaint and purported cause of action be dismissed and as grounds for and in support of this Motion, shows as follows:—

(1) That the complaint herein shows upon its face that it is filed for the purpose of obtaining an adjudication of this court concerning the marital status of the plaintiff which such subject matter is beyond the jurisdiction, authority and power of this court to adjudicate.

(2) That the complaint does not involve the amount of Three Thousand Dollars (\$3,000.00) and accordingly this court is without jurisdiction of the purported cause of action.

(3) That an adjudication in this cause necessarily involves the construction, meaning and effect of a divorce decree of the Circuit Court of Sangamon County in the State of Illinois, concerning which subject matter this court does not have jurisdiction, power or authority.

(4) That the complaint fails to disclose the admitted fact that the plaintiff, Verna Leib Sutton, was married to one Walter J. Henzel at Reno, Nevada, on July 3, 1944, and that this defendant paid the amounts specified in the Illinois decree for divorce through and including August 1, 1944, and that by the terms of such Illinois divorce decree this defendant was absolved, relieved and discharged from the burden of further payments to the plaintiff, subsequent to July 3, 1944, the said omitted facts concerning the marriage of the plaintiff to said Walter J. Henzel, and her residence and co-habitation with him as his wife from July 3, 1944, and upon information

and belief alleges, until the month of November 1947, are set forth by the affidavit of the defendant, attached hereto and made a part hereof, pursuant to the provisions of 43(e) and 56 of the rules of Federal Civil Procedure.

(5) That this court has no jurisdiction of the subject matter of the purported cause of action for the reason that the decree of the Circuit Court of Sangamon County, Illinois, requiring the payment of alimony until the remarriage of the plaintiff, has never been modified, set aside or reversed, and that this court does not have jurisdiction of an action for arrearages in alimony unless and until the amount of such arrearage has been determined and entered in the form of a judgment by the court entering said decree, and accordingly the full faith and credit provisions of the United States Constitution does not require this court to give faith or credit to such decree of the Circuit Court of Sangamon County, until that court has entered a final order in the form of a judgment for money.

Wherefore, the defendant moves that the said Complaint and cause of action be dismissed for want of jurisdiction and that summary judgment be entered accordingly.

R. Wells Leib,
Defendant.

A. M. Fitzgerald,
Attorney for Defendant,
908 Ridge Building,
Springfield, Illinois.

13 State of Illinois, } ss.
County of Sangamon. }

R. Wells Leib, being first duly sworn according to law upon oath deposes and states that he is the same person named above as the defendant, and whose name is subscribed to the above and foregoing Motion, and that the said Motion and the matters and things therein contained, are true in substance and in fact, except as to the matters alleged to be upon information and belief, and as to these he believes them to be true.

R. Wells Leib.

Subscribed And Sworn to before me this 29th day of April, A.D. 1950.

Win. F. Fuiten,
Notary Public.

(Seal)

14 State of Illinois, { ss.
County of Sangamon.

Affidavit.

R. Wells Leib, being first duly sworn according to law, upon oath deposes and states that he was divorced from the said Verna Leib Sutton, by decree of the Circuit Court of Sangamon County in the State of Illinois, on October 11, 1939, and that from the date of said decree until the first week of August, 1944, this affiant paid to the plaintiff all sums required to be paid under said decree in full; that afterwards, this affiant learned that the said Verna L. Sutton (then Verna L. Crawford) was lawfully joined in marriage on July 3, 1944, to Walter J. Henzel, in the City of Reno, County of Washoe and State of Nevada, and that from the date of said marriage to said Henzel, as affiant is informed and believes and so states the fact to be, resided with the said Walter J. Henzel, until the month of November, 1947, the plaintiff and said Walter J. Henzel resided and cohabited together as husband and wife, in the City of New York and State of New York; that a full, true and correct certified copy of the application for marriage license and marriage certificate, and the facts surrounding said marriage to Walter J. Henzel, is attached hereto, made a part hereof, and reference had thereto for more particularity.

Affiant further states that afterwards the said Verna Crawford Henzel, the plaintiff, through her attorneys and solicitors, Baker and Rosen, of 545-5th Avenue, New York City, New York, demanded of this affiant that he pay the amount provided by the decree of the Circuit Court of Sangamon County, to the said Verna Crawford Henzel, now the plaintiff, for the months of June and July, 1944, and informing this affiant that his information concerning the remarriage of his former wife was correct, and that pursuant to said demand made by the plaintiff, through her said solicitors, this affiant sent to and paid to the said Verna Crawford Henzel, the sum of One Hundred Eighty Dollars (\$180.00), and received from the solicitors, for the said Verna Crawford Henzel, an acknowledgment of the receipt thereof as being in full of all claims of the said Verna Crawford Henzel under said decree. Affiant states

that true and correct copies of the demand and the receipt mentioned above, made by the solicitors for the plaintiff, are attached hereto and made a part hereof, and reference is made thereto for further particularity.

Affiant further states that the above and foregoing facts are not disclosed by the Complaint of the plaintiff, but that said facts in this affidavit stated are each and all true, are beyond contradiction or dispute, and that this affiant can and will consistently testify under or to said facts and is ready and willing to produce the originals of the documents referred to in this affidavit, upon hearing hereof, and that this affidavit is made pursuant to the provision of the rules of civil practice for the District Courts of the United States, in connection with the Motion of this affiant to dismiss said action, and for final and summary judgment in favor of this affiant, as defendant, and against said Verna Leib Sutton, as plaintiff.

Farther affiant saith not.

R. Wells Leib.

Subscribed And Sworn to before me this 29th day of April, 1950.

Wm. F. Fuiten,
Notary Public.

(Seal)

Motion to Dismiss.

15 Baker and Rosen
A. David Rosen
Carson DeWitt Baker

Law Offices
545. Fifth Avenue
New York 17, N. Y.
Murray Hill 2-1455
August 10, 1944.

Jerome Finkle Esq.
c/o Knotts, & Dobbs
Legislative Reference Bureau
Capitol Building
Springfield, Illinois.

Dear Sir:

Please be advised that your understanding of the re-marriage of our client Mrs. Verna Leib is correct and that said remarriage took place on the third day of July, 1944.

However, the alimony payments for the months of June and July, 1944 are still due and payable under the terms of the Divorce Decree which provided for payments of alimony the first of each month until she re-marries.

We shall expect the check in full settlement by return mail otherwise we shall be compelled to enforce the collection of the amount due.

Very truly yours,

Baker and Rosen,
s/ A. David Rosen.

16. Baker and Rosen
A. David Rosen
Carson DeWitt Baker

Law Offices
545 Fifth Avenue
New York 17, N. Y.
Murray Hill 2-1455
September eighth

1944

Jerome Finkle, Esq.
Legislative Reference Bureau
State Capitol Building
Springfield, Illinois.

Dear Sir:

This is to acknowledge receipt of the check in the sum of \$180, made by R. W. Leib, payable to the order of Verna Crawford Henzel.

This remittance satisfies in full the alimony claim of the former Mrs. Leib.

Yours very truly,
Baker & Rosen,
S/ A. David Rosen.

ADR: dj

Motion to Dismiss.

No. 176660.

Affidavit of Application for Marriage License

State of Nevada, { ss.
County of Washoe. {

The undersigned being duly sworn, deposes and says:

My name is Walter J. Henzel.

My age is 40.

I reside in the City of Reno.

County of _____

State of Nevada.

Previously married Yes. Wife Deceased.

Divorced Yes. When July 3, 1944.

Where Reno, Nevada.

On what grounds Cruelty.

I desire a license to authorize my marriage with:

Her name is Verna L. Crawford.

Who resides in the City of New York City.

County of _____

State of New York.

Whose age is 40.

Previously married Yes. Husband deceased.

Divorced Springfield, Ill.

On what grounds Cruelty.

I know of no legal objection to our marriage.

Walter J. Henzel,
Vera Lee Crawford.

Subscribed and sworn to before me this 3 day of July
A. D. 1944.

E. H. Beemer,
County Clerk,
By V. A. Given,
Deputy Clerk.

18 IN THE SECOND JUDICIAL DISTRICT COURT
of the State of Nevada,
in and for the County of Washoe.

Plaintiff,	vs.	No.	Dept No.
Defendant.			

I, E. H. Beemer, County Clerk and ex officio Clerk of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify that I have compared the foregoing with the original thereof, and that I am the keeper of said original, keeping same on file in my office as the legal custodian, and keeper of the same under the laws of the State of Nevada, and further certify that the foregoing copy, attached hereto is a full, true and correct copy of the Affidavit of Application for Marriage License No. 176660 issued July 3d 1944.

Walter J. Henzel and Vera L. Crawford
and now on file and of record in my office.

I do further certify that the same has not been altered, amended or set aside, and is still of full force and effect.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Court this 30th day of August, A. D. 1944.

S/ E. H. Beemer,
County Clerk.

(Seal)

Motion to Dismiss.

19 I, Wm. McKnight, one of the Presiding Judges of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify that said Court is a Court of Record, having a Clerk and a Seal; and that there is no provision by law for a chief judge or presiding magistrate thereof, that both of said two judges are placed by law on an equality as to authority; that E. H. Beemer, who has signed the annexed attestation, is the duly elected and qualified County Clerk of the County of Washoe, and was at the time of signing said attestation, ex-officio Clerk of said Court.

That said signature is his genuine hand writing, and that all of his official acts as such Clerk are entitled to full faith and credit.

And I further certify that said attestation is in due form of law.

Witness my hand this 30th day of August, A. D. 1944.

S/ Wm. McKnight,

*One of the Presiding Judges of the
Second Judicial District Court of
the State of Nevada, in and for
the County of Washoe.*

State of Nevada, { ss.
County of Washoe.

I, E. H. Beemer, County Clerk and ex-officio Clerk of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify that the Honorable Wm. McKnight, whose name is subscribed to the preceding Certificate, is one of the Presiding Judges of said Court, duly elected and qualified, and that the signature of said Judge to said Certificate is genuine.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court this 30th day of August, A. D. 1944.

(Seal)

S/ E. H. Beemer,

*County Clerk and ex-officio Clerk
of the Second Judicial District
Court of the State of Nevada, in
and for the County of Washoe.*

20

Marriage Certificate.

State of Nevada,
County of Washoe. { ss.

176660

This Is To Certify that the undersigned Clergyman Brewster Adams did, on the 3rd day of July, A. D. 1944 join in lawful Wedlock Walter J. Henzel of Reno, State of Nevada and Verna L. Crawford of New York City, State of New York with their mutual consent in the presence of Paula Brueckner and Willi Brueckner who were witnesses

Rev. Brewster Adams,

Pastor Baptist Church.

Recorded at the request of Rev. Brewster Adams, Filed July 5, 1944.

Delle B. Boyd,

County Recorder.

State of Nevada,
County of Washoe. { ss.

I, Delle B. Boyd, County Recorder in and for Washoe County, do hereby certify that I have compared the foregoing with the original record thereof as the same appears in my office, in vol. "91" of Marriages, page 355 and that the foregoing document is a full, true and correct transcript therefrom, and of the whole of such original record.

Witness my hand and official seal hereunto set this 30th day of August, A. D. 1944.

S/ Delle B. Boyd,

County Recorder,

By S/ Mary Pappas,

Deputy Recorder.

(Seal)

Motion to Dismiss.

21. I, Wm. McKnight, one of the Presiding Judges of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify that said Court is a Court of Record, having a Clerk and a Seal; and that there is no provision by law for a chief judge or presiding magistrate thereof, that both of said two judges are placed by law on an equality as to authority; that Delle B. Boyd, who has signed the annexed attestation, is the duly elected and qualified County Recorder of the County of Washoe, and was at the time of signing said attestation, Recorder of said Court.

That said signature is her genuine hand writing, and that all of her official acts as such Recorder are entitled to full faith and credit.

And I further certify that said attestation is in due form of law.

Witness my hand this 30th day of August A. D. 1944.

S/ Wm. McKnight,

*One of the Presiding Judges of the
Second Judicial District Court of
the State of Nevada, in and for
the County of Washoe.*

State of Nevada, { ss.
County of Washoe.

I, E. H. Beemer, County Clerk and ex-officio Clerk of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify that the Honorable Wm. McKnight, whose name is subscribed to the preceding Certificate, is one of the Presiding Judges of said Court, duly elected and qualified, and that the signature of said Judge to said Certificate is genuine.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court this 30th day of August A. D. 1944.

(Seal)

S/ E. H. Beemer,

*County Clerk and ex-officio Clerk of
the Second Judicial District Court
of the State of Nevada, in and for
the County of Washoe.*

Indorsed: Filed May 1, 1950. G. W. Schwaner, Clerk.

22 And afterwards, to wit: on the 16th day of May, A. D. 1950, the following further proceedings were had in said court in said case and were entered of record, to wit:

Tuesday, May 16, 1950.

Court met pursuant to adjournment.

Present, the Honorable Charles G. Briggle, Judge.

Verna Leib Sutton, } Civil Action
vs. } No. 1134.
R. Wells Leib.

This cause coming on this day to be heard upon the motion of the defendant to dismiss the complaint, the court hears the arguments of counsel thereon and not being fully advised in the premises, takes the same under advisement. It is ordered by the court that the plaintiff have leave to file a brief herein by May 22, 1950 and that the defendant have leave to file a reply brief herein by May 31, 1950.

23 And afterwards, to wit: on the 29th day of May, A. D. 1950, the following further proceedings were had in said court in said case and were entered of record, to wit:

Monday, May 29, 1950.

Court met pursuant to adjournment.

Present, the Honorable Charles G. Briggle, Judge.
• • (Caption—1134) • •

Comes now the plaintiff herein by Howard R. Blalock, Esq., her attorney, and moves the court for leave to file reply, with accompanying affidavits attached, to the defendant's motion to dismiss, and the court having duly considered the said motion and being fully advised in the premises, it is ordered by the court that the said motion be and is hereby allowed.

Reply to Motion to Dismiss.

24 And afterwards, to wit: on the 29th day of May, A. D. 1950, there was filed in the office of the Clerk of said court, a certain Reply to Motion to Dismiss, with Accompanying Affidavits, which said Reply was and is in the words and figures following, to wit:

25 IN THE UNITED STATES DISTRICT COURT.
• • • (Caption—1134) • •

**REPLY TO MOTION TO DISMISS, WITH
ACCOMPANYING AFFIDAVITS.**

Now comes the Plaintiff, Verna Leib Sutton, by F. T. Carson Law Offices, by Joseph R. Carson, of Counsel, Howard R. Blalock and Jean S. Sheppard, her attorneys, and in reply to Defendant's Motion to Dismiss, states as follows:

1. Plaintiff denies the allegations contained in Paragraph One of Defendant's motion to dismiss.
2. Plaintiff denies the allegations contained in Paragraph Two of Defendant's motion to dismiss.
3. Plaintiff denies the allegations contained in Paragraph Three of Defendant's motion to dismiss.
4. Plaintiff denies the affirmative matters contained in Paragraph Four in part and states that while she went through a marriage ceremony with one Walter J. Henzel in Reno, Nevada, on July 3, 1944, that this marriage was subsequently declared null and void and of no legal effect by decree of the Supreme Court of New York on June 6, 1947, at which time the aforesaid Supreme Court of New York, sitting in the County of New York, State of New York, granted the Plaintiff a decree of annulment and an exemplified copy of this decree is herewith attached as Plaintiff's Exhibit "B". Plaintiff further states that

26 the wife of the said Walter J. Henzel secured a decree of separation from said Walter J. Henzel on June 22, 1945, in the Supreme Court of the County of New York, State of New York, in which decree the Court declared a previous Reno, Nevada divorce secured by said Walter J. Henzel to have been void, an exemplified copy of which is herewith attached as Plaintiff's Exhibit "A". Plaintiff further denies that she cohabited with the said Walter

J. Henzel from July 3, 1944 until the month of November, 1947, and states that upon the filing of a complaint for separation by Dorothy Henzel against Walter J. Henzel, on August 3, 1944, the Plaintiff and said Walter J. Henzel ceased cohabiting, all of which matters appear more fully in an affidavit executed by the Plaintiff and herein attached.

5. Plaintiff admits the allegations contained in Paragraph Five which states that the decree in the Circuit Court of Sangamon County, Illinois has never been modified, set aside or reversed but denies that this Court lacks jurisdiction to hear these matters.

Wherefore, the Plaintiff prays that the Motion to Dismiss be overruled.

Verna Leib Sutton,
By Joseph R. Carson,
One of her Attys:

F. T. Carson Law Office,
Joseph R. Carson,
Attorney,
102 East Main Street,
Urbana, Illinois.

Howard R. Blalock,
Attorney,
1404 South 11th Street,
Springfield, Illinois.

Jean S. Sheppard,
Attorney,
303 East Washington Street,
Bloomington, Illinois.

(Caption)

State of New York, { ss:
County of New York. }

Verna Leib Sutton, being duly sworn deposes and says: I am the plaintiff herein. I was born in Rochester, State of Illinois, and on June 25, 1924, I was married to R. Wells Leib, the defendant herein, in Jacksonville, State of Illinois, and that we lived as husband and wife in Springfield, Illinois until October, 1939. That on or about October 11, 1939, the Circuit Court of Sangamon County, State of Illinois, granted to me a final decree of divorce, on the ground that the defendant herein was guilty of extreme and repeated cruelty in the manner and form as charged in the complaint filed by me in said divorce action. I have been informed that a copy of said decree is attached to the complaint in the within action.

That by the terms of said decree, the defendant, R. Wells Leib, was ordered to pay to me the sum of \$125.00 each month after the date of the entry of said decree, for so long as I remain unmarried or for so long as said decree remained in force and effect, unaltered and unmodified. That payments under the terms of said decree were made to me by said defendant to the first day of August, 1944. That on said day the defendant ceased to make further payments.

That on July 3, 1944, I entered into a ceremony of marriage with Walter J. Henzel, in Reno, Nevada. That 28 on or about August 3, 1944, Walter J. Henzel was served with a copy of a summons and complaint in an action instituted by Dorothy Henzel, as plaintiff, against said Walter J. Henzel, as defendant, in the Supreme Court of the State of New York, County of New York, for a decree separating said Dorothy Henzel, forever upon the ground of abandonment and cruel and inhuman treatment and on the further ground that a decree of divorce procured by said Walter J. Henzel, against said Dorothy Henzel, in the County of Washoe, State of Nevada, on July 3, 1944, was void and without force and effect.

That, immediately upon being informed of service of said summons and complaint, relations between Walter J. Henzel and myself ceased. This was on or about August 3,

1944, one month after the performance of the marriage ceremony in Reno, Nevada.

That, on or about June 22, 1945, a decree or judgment was entered in the Office of the Clerk of the County of New York, State of New York, whereby it was ordered, adjudged and decreed, that the decree of divorce procured by Walter J. Henzel, against Dorothy Henzel in the County of Washoe, State of Nevada, on July 3, 1944, be declared null and void and without force and effect, and that the plaintiff Dorothy Henzel, be separated from the bed and board of Walter J. Henzel forever. That attached hereto, and made a part of this affidavit, is an exemplified copy of this decree.

That, in the month of January, 1945, I instituted an action in the Supreme Court, State of New York, County of New York, for a decree or judgment ordering and directing that my said marriage to Walter J. Henzel, in Reno, Nevada, be annulled on the ground that it was void from the time of its inception. That the prosecution of said action was held in abeyance pending the trial of the aforesaid action brought by Dorothy Henzel against Walter J.

Henzel, in Reno, Nevada, to be an annulity and void.

29 That, pending the prosecution of this action, a motion was made in my behalf for an order directing said Walter J. Henzel to pay to me alimony Pendente Lite and Counsel fees. This motion came on to be argued before Mr. Justice Gavegan, and on or about September 23, 1946, said motion was denied on the ground that the marriage between myself and Walter J. Henzel, was void ab initio.

That, on or about March 18, 1947, the action brought by me against Walter J. Henzel for the annulment of my marriage to him because of the previous valid existing marriage between Walter J. Henzel and Dorothy Henzel came on to be heard before Mr. Justice Valente, in the Supreme Court, State of New York, County of New York. Walter J. Henzel failed to appear in said action, and judgment by default was granted on or about April 22, 1947. That, thereafter said Walter J. Henzel made a motion to open and set aside said default. Said motion was granted. That on or about May 22, 1947 the said action for annulment regularly came on to be heard before Mr. Justice Benedict Dineen, at Special Term, Part VI of the Supreme Court, held in and for the County of New York, State of New York. The defendant, Walter J. Henzel, appeared by an

attorney. The issues were duly tried before the said Mr. Justice Dineen. That, on or about June 6, 1947, said Justice made and filed in the Office of the Clerk of the County of New York, State of New York his Findings of Fact and Conclusions of Law, that I was entitled to a judgment declaring the marriage between myself and Walter J. Henzel, to be a nullity, because of the prior valid existing marriage of the defendant Walter J. Henzel to Dorothy Henzel. That on June 6, 1947 Mr. Justice Dineen, signed an interlocutory judgment, wherein and whereby it was adjudged and decreed that I was entitled to a judgment annulling the marriage between myself and the defendant Walter J. Henzel, and declaring the same to be null and void. That this judgment became final as a matter of course three (3) months after the entry of the filing thereof. Attached hereto and made a part of this affidavit is an exemplified copy of said decree or judgment.

30 That on November 21, 1947, I married Sherwood Sutton and we are still husband and wife.

It is deponent's contention, that her attempted marriage to Walter J. Henzel, at Reno, Nevada, was invalid and absolutely void from its inception, and was so declared by a judgment of the Supreme Court of the State of New York after due trial and deliberation. That the judgment or decree entered in the Circuit Court of Sangamon County, State of Illinois, was not revoked by the subsequent attempted invalid marriage of deponent in Reno, Nevada, that the only means by which said decree may be vacated is by deponent entering into a valid marriage, which deponent did on November 21, 1947, when she married Sherwood Sutton; that R. Wells Leib, the defendant herein, by the provisions and terms of said decree, is in default in payment of alimony from August 1, 1944 to November 21, 1947, amounting to Five Thousand (\$5000.00) Dollars with interest.

Verna Leib Sutton.

Sworn to before me, this 19th day of May, 1950.

(Seal)

Fritzi V. Goldstein.

Fritzi V. Goldstein,

Notary Public, State of New York,

No. 31-1492200

Qualified in New York County,
Cert. filed with N. Y. Co. Clk. & Reg.
Comission expires March 30, 1951

State of New York, { ss.
County of New York. {

Form 1

No. 27942

I, Archibald R. Watson, County Clerk and Clerk of the Supreme Court, New York County, a Court of Record having by law a seal Do Hereby Certify that Fritz V. Goldstein, whose name is subscribed to the annexed affidavit, deposition, certificate of acknowledgment or proof, was at the time of taking the same a Notary Public in and for the State of New York, duly commissioned and sworn and qualified to act as such throughout the State of New York; that pursuant to law a commission, or a certificate of his official character, and his autograph signature, have been filed in my office; that as such Notary Public he was duly authorized by the laws of the State of New York to administer oaths and affirmations, to receive and certify the acknowledgment or proof of deeds, mortgages, powers of attorney and other written instruments for lands, tenements and hereditaments to be read in evidence or recorded in this State, to protest notes and to take and certify affidavits and depositions; and that I am well acquainted with the handwriting of such Notary Public, or have compared the signature on the annexed instrument with his autograph signature deposited in my office, and believe that the signature is genuine.

In Witness Whereof, I have hereunto set my hand and affixed my official seal this 19 day of May, 1940.

Fee Paid 25¢

(Seal)

Archibald R. Watson,
County Clerk and Clerk of the Supreme
Court, New York County.

*Reply to Motion to Dismiss.***Exhibit "A".**

The People of the State of New York:

By the Grace of God Free and Independent.

To All to Whom These Presents Shall Come or May Concern, Greeting:

Know Ye, That we having examined the records and files in the office of the Clerk of the County of New York and Clerk of the Supreme Court of said State for said County, do find a certain judgment there remaining, in the words and figures following, towit:

(Seal)

**State of New York, { ss.
County of New York. {**

I, Archibald R. Watson, County Clerk and Clerk of the Supreme Court, New York County, do hereby certify that I have compared the attached paper, consisting of 4 pages, with the original thereof filed in my office and that same is a correct transcript of the original and of the whole thereof.

In Witness Whereof I have hereunto set my hand and affixed my official seal.

Not valid without seal upon each page.

May 19, 1950.

(Seal)

/s/ Archibald R. Watson.

At a Special Term; Part V, of the Supreme Court, held in and for the County of New York, at the Court House thereof, situated at Center and Pearl Streets, New York City, on the day of May, 1945.

Present:

Hon. Aaron J. Levy,
Justice.

32 Dorothy Henzel, Plaintiff, }
against }
Walter J. Henzel, Defendant. }

The above entitled action having duly come on to be tried in its regular order before the Court at a Special Term, Part V of the Supreme Court, New York County on the 3rd and 4th days of May, 1945, and upon the said trial the plaintiff having appeared by Jacob Hirsch, Esq., her attorney, and the defendant having appeared by Baker & Rosen, Esq.s., his attorneys, A. David Rosen, Esq. of counsel, and the plaintiff having presented proof in support of her cause of action herein, and the defendant having produced proof in support of his defense therein, and the Court having heard all the evidence on the part of both parties hereto, and after due deliberation, the Court having made its Findings of Fact and Conclusions of Law,

Now, on motion of Jacob Hirsch, Esq., attorney of the plaintiff, it is

Ordered, Adjudged and Decreed that the plaintiff, Dorothy Henzel, be and she hereby is separated from the bed and board of the defendant, Walter J. Henzel, forever, upon the ground of defendant's abandonment, and cruel and inhuman

-1-

treatment of the plaintiff, and his failure to provide for and support her and the issue of the said marriage, and it is further

Ordered, adjudged and decreed that the decree of divorce heretofore procured by the defendant against the plaintiff in the County of Washoe, State of Nevada, on the 3rd day

33 of July, 1944, is hereby declared to be null and void,
and without force and effect, and it is further

Ordered, Adjudged and Decreed that the affirmative defenses contained in the answer of the defendant, be and the same hereby are dismissed, and it is further

Ordered, Adjudged and Decreed that he plaintiff herein is entitled to the custody of the issue of the said marriage, to wit Anne Henzel, age fourteen years, and Floyd Henzel, age eleven years, and it is further

Ordered, Adjudged and Decreed that the defendant, Walter J. Henzel, pay to the plaintiff Dorothy Henzel, during her life, the sum of Fifty (\$50) Dollars on Friday of each and every week, the payments to commence as of the 4th day of August, 1944, which is the date of commencement of this action, giving due credit to the defendant for such voluntary payment made to the plaintiff, or payments of alimony pendente lite as were made during the pendency of this action, to be paid at the plaintiff's residence, 150-31—60th Avenue, Flushing, Long Island, New York, or such other address as may be designated by her to him in writing, as permanent alimony for the support of the plaintiff, and for the support and maintenance and education of the issue of said marriage, to wit, Anne Henzel and Floyd Henzel, and it is further

Ordered, Adjudged and Decreed that the plaintiff recover of the defendant the costs of this action in the sum of

-2-

of \$126.10, to be taxed by the Clerk of this Court, and to be inserted herein by the Clerk, and that the plaintiff have execution therefor.

Enter

A.J.L.

J. S. C.

34

/s/ Archibald R. Watson, Clerk.

Issue of Marriage:

Anne Henzel age 14

Floyd Henzel

Plaintiff's address

150-31-60th Av

~~100-110~~ ~~100-110~~
Flushing, L. I., N. Y.

Defts address

1023—Third Ave.

1828 - 1840
Man, NYC.

(Stamp) Certified Copy Issued Date Jun 22, 1945
Fee 1.60 (2) Clerk M
(Stamp) Certified Copy Issued Date Oct. 25, 1946
Fee 70 Clerk 9
(Stamp) Certified Copy Issued Date Nov 7, 1945
Fee 70 Clerk H

Sir:

Please Take Notice that the within is a true copy of a
this day duly filed and entered in the office of
the clerk of the

Dated, N. Y., 194

Yours, etc.,

Jacob Hirsch,

Attorney for

(Ofc. & P. O. Address)

280 Broadway,

Borough of Manhattan,

N. Y. 7, N. Y.

to

Esq.

Attorney for

File No. 14387 1944

Supreme Court, New York County.

Dorothy Henzel,

Plaintiff,

against

Walter J. Henzel,

Defendant.

Filed and Docketed June 22, 1945 at 3:06 P. M.

Judgment of Separation With Notice of Settlement

25 Sir:

Please Take Notice that the judgment of separation of which the within is a true copy, will be presented for settlement and entry herein to Mr. Justice Aaron J. Levy, one of the Justices of the within named Court at Special Term Part V, Superior Court, N. Y. County, Borough of Manhattan in the City of New York on the day 14 of May, 1945 at 10 o'clock in the forenoon.

Dated, N. Y., May 10, 1945.

Yours, etc.,

Jacob Hirsch,

Attorney for Pltf.

(Ofc. & P. O. Address).

280 Broadway,

Borough of Manhattan,

N. Y. 7, N. Y.

to

Esq.,

Attorney for

Jacob Hirsch

Attorney for Plaintiff

(Ofc. & P.O. Address)

280 Broadway

Borough of Manhattan NY7, NY

To

Esq.,

Attorney for

Service of a copy of the within

is

hereby admitted.

Dated N. Y., May 10, 1945

/s/ A. David Rosen

Attorney for Defendant.

(Stamp) Photostat Copies Issued Stub No. 64354
Pages Total Pages 4 May 19, 1950 County Clerk, N. Y.
By B

(Stamp) Special Term Part 1 Paper Submitted Feb
21, 1946 Numbered 7

(Stamp) Fee Paid 25c Stub No. 17174 Jun 21, 1945
County Clerk N. Y. County By J Cashier

(Stamp) Special Term Part 1 Paper Submitted Num-
bered 4

Recorded June 23, 1945, Photostat Div., New York
County Clerk's Office.

36. All of which we have caused by these presents to be exemplified and the Seal of our said County and Supreme Court to be hereunto affixed.

Witness, Hon. William C. Hecht, Jr., a Justice of the Supreme Court of the State of New York of the County of New York, the 19th day of May in the year of our Lord one thousand nine hundred and fifty, and of our independence the one hundred and seventy-fourth.

/s/ Archibald R. Watson,

(Seal) *County Clerk and Clerk of the Supreme Court, New York County.*

I, William C. Hecht, Jr., a Justice presiding at a Special Term of the Supreme Court of the State of New York for the County of New York, do hereby certify that Archibald R. Watson, whose name is affixed to the preceding exemplification is the Clerk of the County of New York, and Clerk of the Supreme Court for said County, duly appointed and sworn, and that full faith and credit are due to his official acts. I further certify that the Seal affixed to the exemplification is the seal of our said County and of the Supreme Court, and that the attestation thereof is in due form and by the proper officer.

Dated, New York, May 19th, 1950.

/s/ William C. Hecht, Jr.,

Justice of the Supreme Court of the State of New York.

State of New York, { ss.
County of New York.

I, Archibald R. Watson, County Clerk and Clerk of the Supreme Court of the State of New York, County of New York, do hereby certify that Hon. William C. Hecht, Jr., whose name is subscribed to the preceding certificate is a Justice presiding at a Special Term of the Supreme Court of said State in and for the County of New York, duly elected and qualified, and that the signature of said Justice to said certificate is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of said County and Court this 19th day of May, 1950.

/s/ Archibald R. Watson,

(Seal) *County Clerk and Clerk of the Supreme Court, New York County.*

Exhibit "B".

The People of the State of New York:

By the Grace of God Free and Independent to All to Whom These Presents Shall Come or May Concern, Greeting:

Know Ye, That we having examined the records and files in the office of the Clerk of the County of New York and Clerk of the Supreme Court of said State for said County, do find a certain judgment there remaining, in the words and figures following, towit:

(Seal)

State of New York, { ss.
County of New York.

I, Archibald R. Watson, County Clerk and Clerk of the Supreme Court, New York County, do hereby certify that I have compared the attached paper, consisting of 3 pages, with the original thereof filed in my office and that same is a correct transcript of the original and of the whole thereof.

In Witness Whereof, I have hereunto set my hand and affixed my official seal.

May 19, 1950.

(Seal)

/s/ Archibald R. Watson.

Not Valid Without Seal Upon Each Page.

At a Special Term, Pat VI of the Supreme Court, held in and for the County of New York, at the Courthouse, in the Borough of Manhattan, City of New York, on the 6 day of June, 1947.

Present:

Hon. Benedict D. Dineen, Justice.

38

Special Term Part VI

June 6, 1947

No. 31549—1946

Verna Lee Henzel,

Plaintiff,

—against—

Walter J. Henzel,

Defendant.

This action brought by the plaintiff for the annulment of her marriage to the defendant because of the previous, valid, existing marriage of the defendant, having duly come on to be tried before this Court at a Special Term Part VI held in and for the County of New York, at the Courthouse, Foley Square Borough of Manhattan, City of New York, on the 22nd day of May, 1947, and the plaintiff having appeared by Isidor Neuwirth, Esq., and the defendant by J. Preston Nottur, Esq., and the defendant having pursuant to stipulation and with the approval of the Court, withdrawn his answer to the complaint herein, and the issues having been duly tried before the undersigned without a jury, and judgment having been awarded to the plaintiff;

And the Court having on the 6th day of June, 1947, made and filed in the office of the Clerk of the County of New York, his findings in writing, stating separately the facts found and the conclusions of law, deciding that plaintiff is entitled to judgment against the defendant declaring the nullity of the marriage between the parties hereto, pursuant to statute, because defendant had another wife living at the time of said marriage,

Now on motion of Isidor Neuwirth, Esq. attorney for

the plaintiff, it is

39 Ordered, Adjudged and Decreed that the plaintiff is entitled to a judgment annuling the marriage between the plaintiff and defendant and declaring the same null and void and freeing the parties from the obligation thereof.

Ordered, Adjudged and Decreed that this judgment is interlocutory, but shall become the final judgment as of course three months after the entry and filing hereof, unless for sufficient cause the court in the meantime shall have otherwise ordered. Upon this judgment becoming the final judgment, the said marriage shall be annulled and declaring the same null and void, and the parties shall thereby be freed from the obligations thereof.

Enter

B. D. D.

J. S. C.

/s/ Archibald R. Watson, Clerk.

Issue of Marriage—None

Plaintiff's address 135 East 63 St, New York City

Certificate of County Clerk

State of New York, { ss.
County of New York.

I, Archibald R. Watson, County Clerk and Clerk of the Supreme Court, New York County, Do Hereby Certify that the foregoing interlocutory judgment of annulment has become final.

In Witness Whereof, I have hereunto set my hand this 10 day of September, 1947.

/s/ Archibald R. Watson,
County Clerk and Clerk of the
Supreme Court, New York
County.

Certified Copy Issued

Date Sep 23, 1947

Fee 50 cents

Clerk G

Sir:

Please take notice that the within judgment will be
40 presented for signature to Mr. Justice Dineen at the
Office of the Clerk of Special Term Part VI, in the
Court House, Foley Square, New York City, on the 5th day
of June, 1947.

Dated, New York, June 2, 1947.

Yours, etc.,

Isidor Neuwirth,

Attorney for Plaintiff.

To: J. Preston Mottur, Esq.,
Attorney for Defendant.

Copy Received

June 2nd, 1947

/s/ J. Preston Mottur
by Wm. Mottur

Attorney for Defendant.

(Stamp) Recorded Jun 11 1947 Photostat Div. New
York County Clerk's Office:

(Stamp) Filed Jun 10 '47 New York CC Clerk's Office.

No. 31549-1946

Supreme Court—New York County

Verna Lee Henzel,

Plaintiff,

—against—

Walter J. Henzel,

Defendant.

Filed June 10-1947 at 2 P. M.

Judgment With Notice of Settlement.

Isidor Neuwirth,

Attorney for Plaintiff,

50 Court St., B'klyn 2, N. Y.

(Stamp) Photostat Copies Issued Stub No. 64353
Pages Total Pages 3 May 19 1950 County Clerk, N. Y.
By B

No. P 1734

Reply to Motion to Dismiss.

All of which we have caused by these presents to be exemplified and the Seal of our said County and Supreme Court to be hereunto affixed.

Witness, Hon. William C. Hecht, Jr., a Justice of the 41 Supreme Court of the State of New York for the County of New York, the 19th day of May in the year of our Lord one thousand nine hundred and fifty, and of our independence the one hundred and seventy-fourth.

/s/ Archibald R. Watson,

County Clerk and Clerk of the Supreme Court, New York County.

(Seal)

I, William C. Hecht, Jr., a Justice presiding at a Special Term of the Supreme Court of the State of New York for the County of New York, do hereby certify that Archibald R. Watson whose name is affixed to the preceding exemplification, is the Clerk of the County of New York, and Clerk of the Supreme Court of said County, duly appointed and sworn, and that full faith and credit are due to his official acts. I further certify that the Seal affixed to the exemplification is the Seal of our said County and of the Supreme Court, and that the attestation thereof is in due form and by the proper officer.

Dated, New York, May 19th, 1950.

/s/ William C. Hecht, Jr.

Justice of the Supreme Court of the State of New York.

State of New York, { ss.
County of New York.

I, Archibald R. Watson, County Clerk and Clerk of the Supreme Court of the State of New York, County of New York, do hereby certify that Hon. William C. Hecht, Jr., whose name is subscribed to the preceding certificate is a Justice presiding at a Special Term of the Supreme Court of said State in and for the County of New York, duly elected and qualified, and that the signature of said Justice to said certificate is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of said County and Court this 19th day of May, 1950.

/s/ Archibald R. Watson,
County Clerk and Clerk of the
Supreme Court, New York
County.

(Seal)

Indorsed: Filed May 29, 1950. G. W. Schwaner, Clerk.

42

IN THE UNITED STATES DISTRICT COURT.

(Caption—1134)

AFFIDAVIT.

Howard R. Blalock, being first duly sworn on oath deposes and says that on Monday, May 29th, 1950, he personally delivered an exact copy of the attached Reply to Motion to Dismiss with Accompanying Affidavits in the above-entitled case to A. M. Fitzgerald, Attorney for the defense, at his office, 524 East Monroe Street, Springfield, Illinois.

Howard R. Blalock.

Subscribed and Sworn to Before me this 29th day of May, A. D. 1950.

G. W. Schwaner,
Clerk, U. S. District Court.

(Seal)

Indorsed: Filed May 29, 1950. G. W. Schwaner, Clerk.

Amendment to Motion to Dismiss.

43 The Clerk omits at this point Item No. 5 of Appellant's Designation of Contents of Record on Appeal for the reason that said documents were never filed in the office of the Clerk.

44 And afterwards, to wit: on the 5th day of June, A. D. 1950, the following further proceedings were had in said court in said case and were entered of record, to-wit:

Monday, June 5, 1950.

Court met pursuant to adjournment.

Present, the Honorable Charles G. Briggle, Judge.

• • • (Caption—1134) • • •

It is ordered by the court that leave be and is hereby given the defendant herein to file an amendment to the motion to dismiss by the addition of a prayer for summary judgment.

45 And afterwards, to wit: on the 5th day of June, A. D. 1950, there was filed in the office of the clerk of said court, a certain Amendment of Motion to Dismiss by Addition of Prayer for Summary Judgment, which said Amendment, together with proof of service thereof, was and is in the words and figures, following, to wit:

46 IN THE UNITED STATES DISTRICT COURT.

• • • (Caption—1134) • • •

AMENDMENT OF MOTION TO DISMISS BY ADDITION OF PRAYER FOR SUMMARY JUDGMENT.

Now comes the defendant, R. Wells Leib, by A. M. Fitzgerald, his solicitor, pursuant to leave first asked and obtained, and amends the Motion to Dismiss heretofore filed in this cause, in the following particulars:

(1) By entering the general appearance of the defendant for the purposes herein disclosed of moving for summary judgment.

(2) By striking from the Motion heretofore filed, the word "accordingly" being the last word of said Motion.

(3) By substituting in lieu and in place of said word "accordingly", the following:

"In bar of said action on the ground that there is no genuine issue as to any material fact and that the defendant is entitled to a judgment as a matter of law."

(4) That the complete prayer of the Motion heretofore filed as now, amended, be so amended so as to read in its entirety as follows:

"Wherefore the defendant moves that the said Complaint and cause of action be dismissed for want of jurisdiction, and that in the alternative if the court finds that it has jurisdiction, then that summary judgment in bar of said action on the ground that there is no genuine issue as to any material matter of law, as to the entire cause 47 of action alleged in the complaint herein in accordance with Rule 56 (b) of Federal Court Rules."

R. Wells Leib,

Defendant.

~~A. M. Fitzgerald,~~

Attorney for Defendant.

Subscribed and Sworn to before me this 3rd day of June, 1950.

Wm. F. Fuiten,

Notary Public.

Indorsed: Filed June 5, 1950. G. W. Schwaner, Clerk.

(Caption—1134)

PROOF OF SERVICE.

A. M. Fitzgerald, being first duly sworn on oath deposes and says that on Saturday, June 3, 1950, he mailed a complete copy of the within attached Amendment, in the above entitled case, to Howard Ralph Blalock, whose address is 1404 South 11th Street, Springfield, Illinois, properly addressed to him at that address, and to F. T. Carson Law Offices, Joseph R. Carson, of Counsel, 102 East Main Street, Urbana, Illinois, with the required and sufficient amount of United States Postage, first class, placed upon the envelope containing said Amendment, and deposited in the United States mail at Springfield, Illinois.

A. M. Fitzgerald.

Subscribed and Sworn to before me this 3rd day of June, A. D. 1950.

Wm. F. Fuiten,

Notary Public.

(Seal)

Indorsed: Filed June 5, 1950. G. W. Schwaner, Clerk.

49 And afterwards, to wit: on the 16th day of June, A. D. 1950, there was filed in the office of the Clerk of said Court, a certain Reply to Motion to Dismiss, with Accompanying Affidavits, which said Reply was and is in the words and figures, following, to wit:

(Caption—1134)

REPLY TO MOTION TO DISMISS, WITH
ACCOMPANYING AFFIDAVITS.

Now comes the plaintiff, Verna Leib Sutton, by F. T. Carson Law Offices, by Joseph R. Carson, of counsel, Howard R. Blalock and Jean S. Sheppard, her attorneys, and in reply to Defendant's Motion to Dismiss, states as follows:

1. Plaintiff denies the allegations contained in Paragraph One of Defendant's Motion to Dismiss.
2. Plaintiff denies the allegations contained in Paragraph Two of Defendant's Motion to Dismiss.
3. Plaintiff denies the allegations contained in Paragraph Three of Defendant's Motion to Dismiss.
4. Plaintiff denies the affirmative matters contained in Paragraph Four in part and states that while she went through a marriage ceremony with one Walter J. Henzel in Reno, Nevada, on July 3, 1944, that this marriage was subsequently declared null and void and of no legal effect by decree of the Supreme Court of New York on June 6, 1947, at which time the aforesaid Supreme Court of New York, sitting in the County of New York, State of New York granted the plaintiff a decree of annulment and an exemplified copy of this decree is herewith attached 51 as Plaintiff's Exhibit "B". Plaintiff further states that the wife of the said Walter J. Henzel secured a decree of separation from said Walter J. Henzel on June 22, 1945, in the Supreme Court of the County of New York, State of New York, in which decree the Court declared a previous Reno, Nevada divorce secured by said Walter J. Henzel to have been void an exemplified copy of which is herewith attached as plaintiff's Exhibit "A". Plaintiff further denies that she cohabited with the said Walter J. Henzel from July 3, 1944, until the month of November, 1947, and states that upon the filing of a complaint for separation by Dorothy Henzel against Walter J. Henzel, on August 3, 1944, the plaintiff and said Walter J. Henzel ceased cohabiting, all of which matters appear more fully in an affidavit executed by the plaintiff and herein attached.
5. Plaintiff admits the allegations contained in Paragraph five which states that the decree in the Circuit Court of Sangamon County, Illinois, has never been modified, set aside or reversed but denies that the court lacks jurisdiction to hear these matters.

Wherefore, the plaintiff prays that the Motion to Dismiss be overruled.

Verna Lieb Sutton,
Plaintiff.

Reply to Motion to Dismiss.

State of New York, } ss.
County of New York. }

Verna Leib Sutton, being first duly sworn upon her oath deposes and states that she has read the above and foregoing Reply to Motion to Dismiss with Accompanying Affidavits, by her subscribed, knows the contents thereof, and that the same are true in substance and in fact.

Verna Leib Sutton.

Fritzi V. Goldstein,
Notary Public, State of New York,
No. 31-1492200,
Qualified in New York County,
Cert. filed with N. Y. Co. Clk. & Reg.
Commission expires March 30, 1951.

Subscribed and sworn to before me this 31st day of May, A. D. 1950.

Fritzi V. Goldstein,
Notary Public.

52 Joseph P. Carson,
Attorney,
102 East Main Street,
Urbana, Illinois.

Howard R. Blalock,
Attorney,
1404 South 11th Street,
Springfield, Illinois.

Jean S. Sheppard,
Attorney,
303 East Washington Street,
Bloomington, Illinois.

State of New York, } ss.
County of New York. }

No. 31191.

I, Archibald R. Watson, County Clerk and Clerk of the Supreme Court, New York County, a Court of Record having by law a seal, Do Hereby Certify that Fritz C. Goldstein whose name is subscribed to the annexed affidavit, deposition, certificate of acknowledgment of proof, was at the time of taking the same a Notary Public in and for the State of New York, duly commissioned and sworn and qualified to act as such throughout the State of New York; that pursuant to law a commission, or a certificate of his official character, and his autograph signature, have been filed in my office; that as such Notary Public he was duly authorized by the laws of the State of New York to administer oaths and affirmations, to receive and certify the acknowledgment or proof of deeds, mortgages, powers of attorney and other written instruments for lands, tenements and hereditaments to be read in evidence or recorded in this State, to protest notes and to take and certify affidavits and depositions; and that I am well acquainted with the handwriting of such Notary Public, or have compared the signature on the annexed instrument with his autograph signature deposited in my office, and believe that the signature is genuine.

In Witness Whereof, I have hereunto set my hand and affixed my official seal this 31 day of May, 1950.

Archibald R. Watson,
*County Clerk and Clerk of the Supreme
Court, New York County.*

Indorsed: Filed June 16, 1950. G. W. Schwaner, Clerk.

53 And afterwards, to wit: on the 16th day of June, A. D. 1950, the following further proceedings were had in said court in said case and were entered of record, to wit:

Friday, June 16, 1950.

Court met pursuant to adjournment.

Present, the Honorable Charles G. Briggle, Judge.
* * * (Caption—1134) * *

This cause coming on to be heard by the court on the amended motion to dismiss and for summary judgment, said cause is submitted on defendant's amended motion and taken under advisement by the court.

54 And afterwards, to wit: on the 21st day of August, A. D. 1950, there was filed in the office of the Clerk of said Court, a certain Opinion of the Court, which said Opinion was and is in the words and figures, following, to wit:

55 IN THE DISTRICT COURT OF THE UNITED STATES.
* * * (Caption—1134) * *

Before Charles G. Briggle, United States District Judge.

Appearances:

Joseph R. Carson, Urbana, Illinois; Jean S. Shepard, Urbana, Illinois; Howard R. Blalock, Springfield, Illinois, for the Plaintiff.

A. M. Fitzgerald, Springfield, Illinois; Walter T. Day, Springfield, Illinois, for the Defendant.

OPINION.

Plaintiff sues defendant to recover accrued payments of alimony under a certain decree of divorce rendered by the Circuit Court of Sangamon County, Illinois, on October 11, 1939. This decree, among other things, provides that the defendant shall on or before the first day of each month pay the plaintiff the sum of \$125.00, continuing "so long

as plaintiff shall remain unmarried or for so long as this decree remains in full force and effect, unaltered and unmodified." Plaintiff, a resident of New York, asserts that there is due her under this decree, accrued monthly installments from August 1, 1944, to November 1, 1947, amounting to \$5000.00 and brings suit against the defendant, a resident of Illinois. This is met by a motion by the defendant to dismiss for want of jurisdiction, chiefly on the grounds that the complaint raises the question of the construction and effect of a divorce decree, and that the Federal Court is without jurisdiction to act concerning the marital status of the plaintiff and defendant. Alternatively, defendant's motion as amended prays for a summary judgment.

The motion is supported by the affidavit of the defendant which discloses that the defendant has paid

56 to the plaintiff all sums required to be paid under said decree of divorce to August 1, 1944, and that the plaintiff on July 3, 1944, at Reno, in the State of Nevada, was remarried to one Walter J. Henzel. Certified copies of the application for marriage license are attached to such affidavit and disclose that the said Walter J. Henzel was divorced at Reno, Nevada, on July 3, 1944, and that Verna L. Crawford was divorced at Springfield, Illinois. A certified copy of the return of Reverend Brewster Adams, pastor of the Baptist Church, discloses that he married Walter J. Henzel of Reno, Nevada, and Verna L. Crawford of New York City, on July 3, 1944, at Reno, Nevada. It appears without dispute that Verna L. Crawford was formerly the wife of defendant and is now Verna Leib Sutton, the plaintiff herein.

Defendant's affidavit attached to his motion further discloses that the plaintiff after her marriage in Nevada to Walter J. Henzel demanded of the defendant that he make the alimony payments provided by said decree for the months of June and July, 1944, (which apparently at that time had not been made in full), and informed the defendant that his information concerning her remarriage was correct; that pursuant to said demand by plaintiff, defendant paid to the plaintiff the sum of \$180 and plaintiff through her counsel acknowledged receipt thereof in full of all claims that she had under said decree of divorce. Attached to the affidavit are also copies of correspondence between counsel for plaintiff and counsel for defendant supporting such statement in the affidavit.

Plaintiff by leave of court has filed a reply to the Motion to Dismiss and counteraffidavits. In the plaintiff's counteraffidavit she admits that she entered into a marriage ceremony with Walter J. Henzel on July 3, 1944, at Reno, Nevada; that at a later date, one Dorothy Henzel who was apparently a former wife of Walter J. Henzel sued the said Walter J. Henzel in the State of New York for a separation decree, and that on June 22, 1945, a decree was entered, a certified copy of which is attached to the counter-affidavit, in which it appears that Dorothy 57 Henzel obtained a decree of separation from the said Walter J. Henzel, and in which it is recited that the decree of divorce heretofore procured by the said Walter J. Henzel in the State of Nevada on July 3, 1944, is null and void. The plaintiff's counteraffidavit further discloses that in the month of January, 1945, she instituted an action in the Supreme Court of New York, praying that her marriage to Walter J. Henzel be declared null and void, and in this suit a decree was entered by the New York Court in June, 1947, decreeing that the plaintiff is entitled to a judgment annuling the marriage between the plaintiff and the said Walter J. Henzel, and that such judgment should become final three months from its entry, unless otherwise ordered. Plaintiff's affidavit further discloses that she was married to one Sherwood Sutton, but does not challenge the assertion of defendant's affidavit concerning the payment of \$180.00 in full release of his obligations under the divorce decree of Sangamon County.

It thus appears that the Court is confronted with a suit for alleged past due payments of alimony under the Sangamon County, Illinois, decree; that one Henzel obtained a decree of divorce at Reno, Nevada, on July 3, 1944, and on the same date married the plaintiff in this proceeding; that afterwards plaintiff demanded that defendant, who apparently had made all alimony payments up to June 1, 1944, pay her alimony for the months of June and July, 1944, and advised defendant that she had remarried. Defendant responded to this request and made such payments and the plaintiff released the defendant from the alimony provisions of the Illinois decree. Later, a New York Court held that the Reno divorce of Henzel was void and awarded a decree to his wife (not plaintiff here) in the State of New York, and still later the present plaintiff obtained a decree in New York holding her marriage to Henzel to

be a nullity. The plaintiff now asserts a liability against defendant for all alimony payments accruing from August 1, 1944, up to the date of her marriage to Sutton on November 21, 1947. It thus appears that there is no substantial or controlling disputed question of fact before the Court on Defendant's amended motion to dismiss or in the alternative for summary judgment.

The first question for consideration is the contention of defendant that this proceeding should be dismissed for want of jurisdiction. While it is true that the Court 58. would not have jurisdiction to in any sense modify or vary the terms of the divorce decree of the Circuit Court of Sangamon County, Illinois, yet that does not appear to be the purpose of this proceeding. This is a suit to recover the accrued payments of alimony alleged to be due plaintiff under the terms of the divorce decree. Under the law of Illinois, Plaintiff would appear to have a vested right in the payments thus decreed, *Craig v. Craig*, 163 Ill. 177; *Dinet v. Eigmann*, 80 Ill. 274; and *Hotzfield v. Hotzfield*, 336 Ill. App. 238; and no reason appears why such right cannot be asserted in the Federal Courts, other jurisdictional requirements being present.

A study of the cases of *Barber v. Barber*, 62 U. S. 582, *Sistare v. Sistare*, 218 U. S. 1, *Barber v. Barber*, 323 U. S. 77, and other cases, convinces the Court that it has jurisdiction of the subject matter of this proceeding, and the motion of defendant to dismiss for lack of jurisdiction should be denied.

Next for consideration is defendant's motion for summary judgment. It appears from the conceded facts that both parties at one time treated the Nevada divorce as a valid decree of the court of Nevada, and entered into a settlement of the alimony questions involved in the Illinois decree, but the plaintiff now contends that the New York decree, having invalidated the Nevada Decree so far as New York is concerned, that this court in giving full faith and credit to the New York decree under consideration, must hold that her marriage to Henzel was void from the beginning, and consequently defendant's liability for alimony under the Illinois decree was a continuing one until she married Sutton. The question of the validity of the Nevada decree of divorce which preceded Henzel's marriage to the plaintiff is not in issue in this proceeding and it is not challenged in this court except by the contention of the plaintiff that the court should accept the finding of

the New York court in that respect. While a Federal Court must give full faith and credit to the laws and decrees of other states, insofar as they are constitutional and insofar as they are entitled to credit in their respective states, yet it appears without dispute that a decree of divorce to Henzel was granted by the State of Nevada, and so far as appears in this proceeding it is a valid and binding decree in that state, and the subsequent marriage of plaintiff to Henzel in Nevada would consequently be presumed to be a valid marriage in the State of Nevada. It should be 59 remembered that defendant was not a party to the proceedings in either state.

We are thus confronted with two conflicting decisions of sister states, and it would be an incongruous situation for this Court to undertake to determine which, if either, of such decisions should in this proceeding be accorded full faith and credit. Fortunately we are not called upon to do so, as the parties themselves accepted the validity of the Nevada decree, and at a time when such decree had never been challenged, entered into a contract settling the question of accrued alimony. There is no question of fraud or overreaching in the settlement then made and no effort has been made to set the same aside. The settlement and release was handled at arms length by the parties through their respective counsel and no reason appears why it should not be held to be a binding obligation upon each. The mere fact that at a later date the plaintiff succeeded in gaining a decree of a New York court holding that her marriage to Henzel was void so far as New York is concerned can make no difference. Indeed, while not suggested in the briefs, the most that could be said for the settlement and release is that such settlement was made under a misapprehension of law and not by reason of any misunderstanding of fact or by reason of any fraud. If the parties misconceived the law they could not now be relieved of their voluntary act by reason of such mistake of law. That they then understood the law is to be presumed. Under such circumstances, I find that plaintiff is not entitled to relief and defendant's motion for summary judgment is allowed.

Counsel for defendant may prepare a judgment order and, after submitting same to counsel for plaintiff, present to the Court.

Chas. G. Briggle,
United States District Judge.

Indorsed: Filed Aug. 21, 1950. G. W. Schwaner, Clerk.

60 And afterwards, to wit: on the 21st day of August, A. D. 1950, the following further proceedings were had in said court in said case and were entered of record, to wit:

61 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—1134)

JUDGMENT.

This cause having come on to be heard at this term upon the verified Complaint of the Plaintiff, Verna Leib Sutton, and the original Motion for a Summary Judgment of Dismissal, and the Amendment thereto, of the Defendant, R. Wells Leib, with supporting Affidavits of fact, and the Reply of the Plaintiff to such Motion to Dismiss, with accompanying Affidavits of fact, and the Court having read and considered the Complaint, the Motions to Dismiss, with supporting Affidavits of the uncontrovetyed facts and the cause having been argued in open court by counsel for the respective parties, and the Court having considered such pleadings, affidavits and arguments of counsel, and having been fully advised in the premises, and having thereafter rendered its written Opinion, Doth Find:

That there is no genuine issue as to any material fact, but that under Rule 52-a of the Rules of Civil Procedure, the action having been tried by the Court without a jury the following facts are especially stated, and the following conclusions of law thereon are accordingly here set forth, namely: that the Plaintiff, Verna Leib Sutton (formerly Verna Leib) obtained a decree of divorce in the Circuit Court of Sangamon County, Illinois, on October 11, 1939, which decree provided that the Defendant, R. Wells Leib, pay the Plaintiff the sum of One Hundred Twenty-

52 Five Dollars (\$125.00) monthly, "so long as the Plaintiff shall remain unmarried, or for so long as said decree remains in force, unaltered and unmodified"; that afterwards, on July 3, 1944, the said Verna Leib, Plaintiff herein, was married to one Walter J. Henzel, at Reno, Nevada, the said Walter J. Henzel having upon the same day and date obtained at Reno, Nevada, a decree for divorce from his wife, then a resident in the State of New York; that after the marriage of the Plaintiff to said

Walter J. Henzel, she, through her attorneys, demanded of the Defendant, R. Wells Leib, that he make the alimony payments provided by said Illinois divorce decree, for the months of June and July, 1944, and informing the Defendant, R. Wells Leib, of her remarriage to said Walter J. Henzel, and that pursuant to said demand, the Defendant, R. Wells Leib, paid to the Plaintiff the sum of One Hundred Eighty Dollars (\$180.00), as in full discharge of all rights under said Illinois divorce decree, which payment was accepted by the Plaintiff, through her counsel, and a receipt and full release was delivered to and is now held by the Defendant, acknowledging full and complete satisfaction of all claims of the said Verna Leib (then Henzel, and now Sutton) under said Illinois decree of divorce; that on June 22, 1945, in an action instituted by Dorothy Henzel, former wife of Walter J. Henzel, said New York Court entered its decree reciting that the decree of divorce theretofore procured by Walter J. Henzel in the State of Nevada, on July 3, 1944, was null and void in the State of New York; that afterwards, in the month of June, 1947, the Plaintiff, Verna Leib Henzel (now Sutton) obtained a decree of annulment in the Supreme Court of New York to the effect that her marriage to said Walter J. Henzel was null and void; that both parties hereto at one time considered and treated the said Nevada divorce decree as a valid decree, and said Nevada marriage as a valid and subsisting contract of marriage, and accordingly entered into said settlement of the alimony payments provided by the Illinois decree; and that the contract of settlement of all alimony questions between the parties was entered into and said release delivered without any element of fraud or overreaching, and was not based upon any misapprehension of fact when so entered into, and that the Plaintiff has not contended that such settlement was based upon any misapprehension of fact or fraud; the court accordingly finds that under the uncontested facts that the Plaintiff is not entitled to the relief in her Complaint prayed, and that the Defendant is entitled to the summary judgment in bar of the action of the Plaintiff, prayed in his Motion, and that the merits of this cause are against the Plaintiff and in favor of the Defendant herein.

It Is Accordingly ordered, adjudged and decreed, that said Complaint herein, be and the same is hereby dismissed for want of merit, with prejudice, and that the Plaintiff

take nothing by her suit, and is forever barred of further action, with costs to the Defendant, taxed and to be taxed by the Clerk of this Court.

Entered this 21st day of August, A. D. 1950.

Chas. G. Briggé,

Judge.

Indorsed: Filed Aug. 21, 1950. G. W. Schwäner, Clerk.

64 And afterwards, to wit: on the 22nd day of August, A. D. 1950, there was filed in the office of the Clerk of said Court, a certain Motion by Plaintiff for a New Trial, which said Motion was and is in the words and figures, following, to wit:

65 IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—1134) • •

MOTION BY PLAINTIFF FOR NEW TRIAL.

Now Comes the Plaintiff, Verna Leib Sutton, by Howard R. Blalock, Joseph R. Carson, and Jean S. Sheppard, her attorneys, and respectfully moves the Court that a new hearing be granted in the above-entitled cause, and as grounds for said motion shows as follows:

1. That the opinion issued by the Court, holding for the defendant in this cause, sets forth as the reason for said holding that correspondence between the attorney representing the plaintiff and the attorney representing the defendant showed that the parties by the payment of the sum of \$180.00 settled all claims of the plaintiff against the defendant for alimony, both past and in the future.

2. That in the judgment subsequently issued by the court, it is set forth that the grounds for the judgment in favor of the defendant was the payment of the said sum of \$180.00 "as in full discharge of all rights under said Illinois divorce decree, which payment was accepted by the Plaintiff, through her counsel, and a receipt and full release was delivered to and is now held by the Defendant, acknowledging full and complete satisfaction of all claims of the said Verna Leib (then Henzel, and now Sutton) under said Illinois decree of divorce." That there has been newly discovered evidence consisting of an affidavit of A. David Rosen, an attorney who is a member of the bar of the State of New York, and

who represented the said Verna Leib Sutton at the time of the alleged complete release, which affidavit shows that it was not the intention of the parties at the time to release all claims of Verna Leib Sutton for alimony against the defendant, but rather that it was the intention of the parties, and the correct interpretation of the correspondence set forth in the Defendant's Motion to Dismiss with reference to said payment reveals that it was the intention of the parties and the purpose of the payment of \$180.00 merely to pay the arrearage at that time due and owing under the said Illinois decree, and it did not take into consideration any contingencies which might arise in the future by acts of court or by the parties, which would renew the payments of alimony under said Illinois decree.

3. That the affidavit of the said A. David Rosen, was previously not available to the plaintiff, but was sought after it became apparent that the court was to rely on the so-called settlement of all claims through the payment of \$180.00 rather than upon the stated grounds for dismissal set forth in the Defendant's Motion to Dismiss; that there is attached hereto and made a part of this motion for new trial the affidavit of the said A. David Rosen, setting forth his knowledge of this occasion; that it appears from this affidavit that it was not the intention of the parties that all claims for alimony which might accrue in the future should be settled for \$180.00, and that it further appears from this affidavit that all the correspondence taking place between the affiant and one Jerome Finkel of Springfield,

Illinois, who at one time represented the defendant, 67 is not set forth in the motion and accompanying affidavits of the defendant, R. Wells Leib.

Wherefore, Plaintiff Prays that a new trial or hearing be granted to the plaintiff in this cause.

Verna Leib Sutton,

Plaintiff,

By Howard R. Blalock,

Joseph R. Carson,

Jean S. Sheppard,

Her Attorneys.

Howard R. Blalock, Attorney,
1404 S. Eleventh St.,
Springfield, Illinois,
Joseph R. Carson and
Jean S. Sheppard, Attorneys,
102 E. Main St.,
Urbana, Illinois.

68 IN THE DISTRICT COURT OF THE UNITED STATES.
(Caption—1134)

State of New York, { ss.
County of New York. {

A. David Rosen, being duly sworn, deposes and says:

I am a member of the Bar of the State of New York and have been duly admitted and licensed to practice as an attorney and counsellor in all the courts of that state; having my office at #305 Broadway, Borough of Manhattan, City, County and State of New York.

In or about the month of August, 1944, I was engaged by the plaintiff named in the above entitled action solely and exclusively for the purpose of obtaining a payment of arrears in alimony then due from the defendant herein, R. Wells Leib, pursuant to a certain Decree of Divorce entered in favor of the plaintiff herein in the Office of the Clerk of the Circuit Court, Sangamon County, Illinois on or about October 11th, 1939.

That as a result of correspondence passing between me and Jerome Finkle of Springfield, Illinois, attorney for R. Wells Leib, the defendant named herein, wherein I 69 brought to the attention of Mr. Finkle that Mr. R.

Wells Leib was indebted to the plaintiff herein for the accrued payments of alimony under the provisions of the aforesaid decree for the months of June and July of 1944, on or about September 8th, 1944 I received from Mr. Finkle a check made by Mr. Leib in the sum of \$180. I acknowledged the receipt of said check and advised Mr. Finkle that it satisfied in full the then accrued payments of alimony due from the defendant herein to the former Mrs. R. Wells Leib, now known as Verna Leib Sutton the plaintiff herein.

That in acknowledging the receipt of the said \$180 which represented accrued payments of alimony then due under the provisions of the aforesaid decree of divorce, it was not contemplated or within the understanding of counsel representing the respective parties, that this payment was to be considered or construed as a release from the payment of any claims that may arise in the future under the said Decree of Divorce, as long as it remained in force and effect and had not been modified by the court granting it.

Motion for New Trial.

I have read the opinion of the Hon. Charles G. Briggle, United States District Judge for the Southern District of Illinois granting the motion of the defendant herein for Summary Judgment, and note from a reading of the last to the concluding paragraph thereof, that the court granted such relief upon the sole ground that the transaction between me and said Jerome Finkle created a settlement and release of the payment of alimony in futuro. The only proper construction, or inference that can be placed upon or drawn in regard to the correspondence 70 passing between me and Mr. Finkle, (all of which is not set forth in the defendant's motion herein to dismiss), I respectfully state is that the check for the \$180 solely represented payment of accrued alimony existing as of August, 1944 and that it did not create a compromise, settlement or release for claims for payment of alimony in the event the right to such a claim should arise in the future. To hold otherwise would be absolutely contrary to the understanding had between counsel representing the respective parties and can not be borne out by the circumstances existing at the time the payment of the said \$180 was made.

A. David Rosen.

Jesse W. Heller.

Sworn to before me this 21st day of July, 1950.

Jesse W. Heller,

(Seal)

Notary Public in the State of N. Y.
Qualified in Queens County.

No. 41-6842450

Cert. filed in Queens, Kings & N. Y.
County Clerk's and Registers Off.
Commission expires Mar. 30, 1952

State of New York, { ss.
County of New York. { ss.

Form 1

No. 47487

I, Archibald R. Watson, County Clerk and Clerk of the Supreme Court, New York County, a Court of Record having by law a seal, Do Hereby Certify that Jesse W. Heller, whose name is subscribed to the annexed affidavit, deposition, certificate of acknowledgment or proof, was at the time of taking the same a Notary Public in and for the State of New York, duly commissioned and sworn and qualified to act as such throughout the State of New York; that pursuant to law a commission, or a certificate of his official character, and his autograph signature, have been filed in my office; that as such Notary Public he was duly authorized by the laws of the State of New York to administer oaths and affirmations, to receive and certify the acknowledgment or proof of deeds, mortgages, powers of attorney and other written instruments for loads, tenements and hereditaments to be read in evidence or recorded in this State, to protest notes and to take and certify affidavits and depositions; and that I am well acquainted with the handwriting of such Notary Public, or have compared the signature on the annexed instrument with his autograph signature deposited in my office, and believe that the signature is genuine.

In Witness Whereof, I have hereunto set my hand and affixed my official seal this 21st day of July, 1950.

Archibald R. Watson,

*County Clerk and Clerk of the
Supreme Court, New York
County.*

Fee Paid 25¢.

Indorsed: Filed Aug. 22, 1950. G. W. Schwaner, Clerk.

71. And afterwards, to wit: on the 28th day of August, A. D. 1950, there was filed in the office of the Clerk of said Court, certain Suggestions in Objection to Motion by Plaintiff for a New Trial, which said Suggestions were and are in the words and figures, following, to wit:

72 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—1134)

SUGGESTIONS IN OBJECTION TO MOTION BY PLAINTIFF FOR NEW TRIAL.

Comes now the defendant, R. Wells Leib, by A. M. Fitzgerald, his attorney and in objection to the Motion of the plaintiff, says the following:—

(1) The Motion of the plaintiff is not based upon newly discovered evidence.

(2) The statements made in the affidavit of A. David Rosen, are not in accord with the understanding of the parties, and are purely unwarranted conclusions, as shown by the correspondence between the defendant R. Wells Leib, A. David Rosen, Baker and Rosen and Jerome R. Finkle, attorney for R. Wells Leib.

(3) The affidavits of the defendant R. Wells Leib and Jerome R. Finkle, hereto attached, clearly disclose that the finding of the Court is entirely proper and fully sustained by the facts.

(4) Affidavits of R. Wells Leib and Jerome R. Finkle, and letters and copies of letters as follows, are attached hereto: July 31, 1944, from Baker and Rosen, signed by A. David Rosen to R. Wells Leib; August 8, 1944, answer of Jerome R. Finkle to Baker and Rosen; August 10, 1944, letter from Baker and Rosen, signed by A. David Rosen to Jerome Finkle; August 14, 1944, reply of Jerome R. Finkle to Baker and Rosen; August 17, 1944, letter from Baker and Rosen, signed by A. David Rosen to Jerome R. Finkle; August 24, 1944, letter to Baker and Rosen from Jerome R. Finkle; August 29, 1944, letter of Baker and

Rosen, signed by A. David Rosen to Jerome R. Finkle;

73 August 31, 1944, letter from Jerome R. Finkle to Baker and Rosen; September 8, 1944, from Baker and Rosen, signed by A. David Rosen, addressed to Jerome R. Finkle. These affidavits and letters clearly show that self-

tlement was final and conclusive of all liability of the defendant to the plaintiff in this case. The Court's attention is called particularly to the statement in the letter of August 8th from Mr. Finkle to Messrs. Baker and Rosen, in which it is said: "It is our understanding that the former Mrs. Leib has remarried and that, under the terms of the divorce decree, no further sums are due her?" That Mr. Rosen understood this is evidenced by his letter to Mr. Finkle of August 10th, in reply to Mr. Finkle's letter of August 8th: "Please be advised that your understanding of the re-marriage of our client Mrs. Verna Leib is correct and that said remarriage took place on the third day of July, 1944." In reply to that letter on August 14th, Mr. Finkle wrote to Baker and Rosen, and stated in the concluding paragraph the following: "Upon receiving a letter from you stating that \$180.00 will be accepted in full settlement of alimony claims, my client will immediately send you a check in that amount."

On August 17th Baker and Rosen, in the letter addressed to Jerome R. Finkle, and signed by David Rosen, endeavoring to secure the full amount demanded of \$250.00, the following: " * * * in order to get this matter disposed of you should send the check for \$250.00, as Mr. Leib surely should be very happy at this time to know that her marriage has relieved him of any further obligations." On August 24th, in reply to that letter, and in refusing to pay the \$250.00, Mr. Finkle wrote Baker & Rosen, as follows: "As stated in my former letter, Mr. Leib will be glad to send the \$250.00 payments due less the \$70.00 already lent or advanced upon your agreement to accept the same in full."

On August 29th Mr. Rosen replied to Mr. Finkle that he would accept the \$180.00 and said: "In accordance with the closing paragraph in your letter of August 24th, I shall expect a check for the above sum as quickly as possible." On August 31st Mr. Finkle sent Baker and Rosen a check for \$180.00, with the following statement: "pursuant to your letter of August 29th, as payment in full of alimony claim of Verna Crawford Henzel, the former Mrs. Leib."

74 And again on September 8th, Baker and Rosen, in a letter signed by A. David Rosen, wrote to Jerome R. Finkle the following letter: "This is to acknowledge ge-

ceipt of the check in the sum of \$180, made by R. W. Leib, payable to the order of Verna Crawford Henzel. This remittance satisfies in full the alimony claim of the former Mrs. Leib."

R. Wells Leib,
Defendant.

A. M. Fitzgerald,
Attorney for Defendant,
504 East Monroe Street,
Springfield, Illinois.

75 State of Illinois,
County of Sangamon. } ss.

Affidavit.

Jerome R. Finkle, being first duly sworn on oath says that he is a practicing attorney at the Bar of the State of Illinois, and has been such for many years last past; that he is now the Secretary of the Legislative Reference Bureau of the State of Illinois;

That heretofore he represented R. Wells Leib, in a suit filed by Verna Leib, his wife, in the Circuit Court of Sangamon County, Illinois, in which she procured a divorce from R. Wells Leib on October 11, 1939; that in the year 1944, Mr. R. Wells Leib brought to him a letter dated July 31, 1944, from the law firm of Baker and Rosen, of 545-5th Avenue, New York, N. Y., signed by A. David Rosen; that thereafter he carried on and had the correspondence which is identified in the Suggestions of the defendant, to which this affidavit and the letters referred to, are attached; that the carbon copies of letters attached are carbon copies of letters which were written by him and mailed to the office of Baker and Rosen, and to which replies were received from A. David Rosen, as shown; that the photostatic copies of letters attached are correct photostatic copies of letters received by him; that he is now and has been for more than twelve years last past, acquainted with Mrs. Verna Leib Sutton, who heretofore was married to Walter J. Henzel; that through his acquaintance and many discussions which he had with her at the time the divorce was obtained by her, and in view of the information which he has had in regard to her attitude towards her husband, it

was his intention and the intention of R. Wells Leib that at the time of the payment of money to her, through Messrs. Baker and Rosen, on August 31, 1944, to make a final and definite settlement in full of all claims of Mrs. Verna Leib (Henzel) Sutton under the divorce decree for alimony and in full satisfaction of all obligations of the defendant, R. Wells Leib, to the plaintiff Verna Leib (Henzel) Sutton, and that no payment would have been made upon any other basis.

That he has read the affidavit of A. David Rosen, attached to the Motion for new Trial, prior to the making of this affidavit, and he thinks that the present opinion of Mr. Rosen is not the opinion which Mr. Rosen had at the time of the correspondence, and at the time of the settlement, as is evidenced by the correspondence; that when the money was sent on August 31, 1944, to Mr. Rosen for Mrs. Leib, it was a payment in full of all of Mr. Leib's obligations forever to Mrs. Leib-Henzel.

Jerome R. Finkle.

Subscribed And Sworn to before me this 25th day of August, A. D. 1950.

Wm. F. Fuiten,
Notary Public.

(Seal)

76 IN THE DISTRICT COURT OF THE UNITED STATES.

* * * (Caption—1134) * *

AFFIDAVIT.

R. Wells Leib, being first duly sworn on oath, deposes and says that he is the defendant in the above entitled cause; that in July, 1944, after he had received a letter from A. David Rosen, in regard to the claim for alimony of the plaintiff in this case, he took this letter to Jerome E. Finkle and directed Jerome E. Finkle to reply to it; that from time to time he conferred with Mr. Finkle and saw the correspondence which is filed with the Objection to the Motion by Plaintiff for New Trial, in this case; that at the time of the payment on August 31st to the plaintiff, who was then, as he understood, Mrs. Verna Henzel, he directed that this payment be made only in the event that it was a final and definite settlement of all of

his obligations to his former wife, who was then Mrs. Verna Henzel, as he understood; that he would have made no payment to her under any other circumstances.

R. Wells Leib.

Subscribed And Sworn to before me this 25th day of August, A. D. 1950.

(Seal)

Wm. F. Fuiten.

77 Baker and Rosen
A. David Rosen
Carson DeWitt Baker

Law Offices
545 Fifth Avenue
New York 17, N. Y.
Murray Hill 2-1455
July 31st, 1944.

Mr. R. Wells Leib,
c/o Franklin Life Insurance Co.,
Springfield, Ill.

Dear Mr. Leib:

Our client, Mrs. Verna Leib, informs us that you are in arrears in the sum of \$250.00 representing Alimony payments for the months of June and July, 1944, at the agreed rate of \$125.00 per month.

Will you please see to it that this amount due is paid immediately. In the event that such payment is not received on or before August 10th we will be compelled to institute necessary proceedings to enforce the collection of same.

Very truly yours,
Baker & Rosen,
By A. David Rosen.

ADR:MB

78

August 8, 1944.

Baker and Rosen,
Attorneys at Law,
545 Fifth Avenue,
New York 17, New York.

Gentlemen:

Mr. R. Wells Leib has referred to me your letter of July 31st relative to the claim of his former wife that he is in arrears in the sum of \$250.00 representing alimony payments for June and July, 1944. It is our understanding that the former Mrs. Leib has remarried and that, under the terms of the divorce decree, no further sums are due her.

Very truly yours,

Legislative Reference Bureau,
Capitol Building,
Springfield, Illinois.

JF:LW

79 Baker and Rosen
A. David Rosen
Carson DeWitt Baker

Law Offices
545 Fifth Avenue
New York 17, N. Y.
Murray Hill 2-1455
August 10, 1944.

Jerome Finkle, Esq.,
c/o Knotts & Dobbs,
Legislative Reference Bureau,
Capitol Building,
Springfield, Illinois.

Dear Sir:

Please be advised that your understanding of the re-marriage of our client Mrs. Verna Leib is correct and that said re-marriage took place on the third day of July, 1944.

However, the alimony payments for the months of June and July, 1944 are still due and payable under the terms of the Divorce Decree which provided for payments of alimony, the first of each month until she re-marries.

Suggestions in Opposition.

We shall expect the check in full settlement by return mail otherwise we shall be compelled to enforce the collection of the amount due.

Very truly yours,
Baker and Rosen,
A. David Rosen.

80

August 14, 1944.

Baker and Rosen,
Attorneys at Law,
545 Fifth Avenue,
New York 17, New York.

Gentlemen:

Thank you for your letter of August 10th relative to the matter of alimony payable to the former wife of R. Wells Leib. We agree that the June payment is due and that under a technical construction of the decree the July payment is also due. Because of this, my client, Mr. Leib, is very willing to settle on the basis of \$250.00 but as money in the sum of \$70.00 was lent by Mr. Leib to his former wife after the divorce and has not been repaid, we feel that the sum of such loans must be deducted from the \$250.00 of alimony payable. This sum of \$70.00 consists of \$25.00 lent in November, 1939, \$20.00 in January, 1940, and \$25.00 in May, 1940.

Upon receiving a letter from you stating that \$180.00 will be accepted in full settlement of alimony claims my client will immediately send you a check in that amount.

Very truly yours,
Legislative Reference Bureau,
Capitol Building,
Springfield, Illinois.

JF:LW

81 Baker and Rosen

David Rosen

Carson DeWitt Baker

Law Offices
545 Fifth Avenue
New York 17, N. Y.
Murray Hill 2-1455

August 17, 1944.

Jerome E. Finkle, Esq.,
Knotts & Dobbs,
Legislative Reference Bureau,
Capitol Building,
Springfield, Illinois.

Dear Sir:

Your letter of August 14 in hand, and contents duly noted. Upon receipt of same we got in touch with our client who was astounded at the information that she had borrowed in November, 1939, \$25.00; in January, 1940, \$20.00; and in May, 1940, \$25.00. She says that if such events had ever taken place during the past five years, Mr. Leib surely would have deducted the same from past payments which she obtained from him after repeated efforts to collect.

However, if you have any letters from her showing the request for these loans, we will get our client to acknowledge the same. If, on the other hand, there are no such letters, then we suggest that in order to get this matter disposed of you should send the check for \$250.00, as Mr. Leib surely should be very happy at this time to know that her marriage has relieved him of any further obligations.

Hoping that the matter will be adjusted along the above lines by return mail, allow us to remain

Very truly yours,
Baker and Rosen,
A. David Rosen.

ADR dem

82

August 24, 1944.

Baker and Rosen,
Attorneys at Law,
545 Fifth Avenue,
New York 17, New York.

Gentlemen:

Pursuant to your letter of August 17th, I am enclosing herewith photostatic copies of three checks sent to Verna L. Leib by R. W. Leib and dated January 10, 1940, May 28, 1940 and May 29, 1940. The January 10th check shows a payment of \$95.00, being \$20.00 in excess of the \$75.00 normal payment. The May 28th check shows the normal payment of \$75.00 and on the following day a check for an additional \$25.00 was made out and sent to Mrs. Leib. The other \$25.00 spoken of in my former letter was telegraphed to Mrs. Leib in November, 1939, pursuant to her urgent request for a loan. None of these sums has been repaid. Several times Mr. Leib took up the matter of repayment with Mrs. Leib but at such times she responded with pleas that she was then unable to make repayments but would do so at a later date. Of course I am unable to send you any photostatic copy of the telegram as we have not the contact with the telegraph company upon the matter.

As stated in my former letter, Mr. Leib will be glad to send the \$250.00 payments due less the \$70.00 already lent or advanced upon your agreement to accept the same in full.

Very truly yours,

Legislative Reference Bureau,
Capitol Building,
Springfield, Illinois.

JF:LW
enc.

83 Baker and Rosen
David Rosen
Carson DeWitt Baker

Law Offices
545 Fifth Avenue
New York 17, N. Y.
Murray Hill 2-1455

August 29th, 1944.

Jerome R. Finkle, Esq.,
Legislative Reference Bureau,
Springfield, Illinois.

Dear Mr. Finkle:

After deliberation with the former Mrs. Leib. Her position was that she would agree to accept the \$180.00, although she still feels that Mr. Leib never loaned the sum of \$70.00 to her.

In accordance with the closing paragraph in your letter of August 24th, I shall expect a check for the above sum as quickly as possible.

Very truly yours,
A. David Rosen.

ADR: dj

84

August 31, 1944

Baker and Rosen
Attorneys at Law
545 Fifth Avenue
New York 17, New York

Gentlemen:

Please find enclosed the personal check of Mr. R. W. Leib in the amount of \$180.00 sent, pursuant to your letter of August 29th, as payment in full of alimony claim of Verna Crawford Henzel, the former Mrs. Leib.

Very truly yours,
Legislative Reference Bureau
Capitol Building
Springfield, Illinois

JF:LW
enc.

Suggestions in Opposition.

85 Baker and Rosen
 A. David Rosen
 Carson DeWitt Baker

Law Offices
 545 Fifth Avenue
 New York 17, N. Y.
 Murray Hill 2-1455

September eighth 1944

Jerome Finkle, Esq.
 Legislative Reference Bureau
 State Capitol Building
 Springfield, Illinois

Dear Sir:

This is to acknowledge receipt of the check in the sum of \$180, made by R. W. Leib, payable to the order of Verna Crawford Henzel.

This remittance satisfies in full the alimony claim of the former Mrs. Leib.

Yours very truly,

Baker & Rosen

A. David Rosen

ADR: dj

Indorsed: Filed Aug. 28, 1950. G. W. Schwaiger, Clerk.

86 IN THE DISTRICT COURT OF THE UNITED STATES.

• • • (Caption—1134) • •

PROOF OF SERVICE.

A. M. Fitzgerald, being first duly sworn on oath deposes and says that he is the attorney for the above named defendant, R. Wells Leib, and that on Saturday, August 26, 1950, he mailed a complete copy of the within attached Suggestions in Objection to Motion by Plaintiff for New Trial, in the above entitled case, to Howard R. Blalock, Attorney, 1404 S. Eleventh Street, Springfield, Illinois, and to Joseph R. Carson and Jean S. Sheppard, Attorneys, 102 E. Main Street, Urbana, Illinois, properly addressed to them at their addresses, with the required and sufficient amount of

United States Postage, first class, placed upon the envelope containing said Suggestions, and deposited in the United States Mail at Springfield, Illinois.

A. M. Fitzgerald.

Subscribed and sworn to before me this 26th day of August, 1950.

(Notarial Seal)

Wm. F. Fuiten,
Notary Public.

Indorsed: Filed Aug. 28, 1950. G. W. Schwaner, Clerk.

87 And afterwards, to wit: on the 5th day of September, A. D. 1950, the following further proceedings were had in said court in said case and were entered of record, to wit:

88 IN THE DISTRICT COURT OF THE UNITED STATES.

* * * (Caption—1134) * * *

**ORDER ON MOTION OF PLAINTIFF FOR
A NEW TRIAL.**

The Court having had under consideration motion of plaintiff herein for a new trial, and having fully considered the affidavit of A. David Rosen in support thereof, as well as the suggestions of defendant in opposition thereto, and the Court having further considered the conceded facts herein, Finds

- (1) That there is no material controverted fact herein;
- (2) That the affidavit of A. David Rosen in support of Plaintiff's motion for a new trial does not present any controverted question of fact but is merely a conclusion of affiant drawn from conceded facts;
- (3) That the conclusions drawn in the Rosen affidavit are not warranted by the conceded facts.

It Is, Therefore, Ordered that the motion of Plaintiff for a new trial be and the same is hereby denied.

Dated this 5th day of September, A. D. 1950.

/s/ Chas. G. Briggle,
United States District Judge.

Indorsed: Filed Sept. 5, 1950. G. W. Schwaner, Clerk.

Notice of Appeal.

89. And afterwards, to wit: on the 3rd day of October, A. D. 1950, there was filed in the office of the Clerk of said Court, a certain Notice of Appeal, which said Notice of Appeal was and is in the words and figures, following, to wit:

90 APPEAL TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SEVENTH CIRCUIT FROM THE
UNITED STATES DISTRICT COURT, SOUTHERN
DISTRICT OF ILLINOIS, SOUTHERN DIVISION.

Verna Leib Sutton, *Plaintiff*,
vs. } Civil Action at Law
R. Wells Leib, *Defendant.* } No. 1134.

NOTICE OF APPEAL.

Notice is hereby given that Verna Leib Sutton, above named, hereby appeals to the United States Circuit Court of Appeals for the Seventh Circuit from the Summary Judgment entered in this action on August 21, 1950.

Plaintiff further appeals from the order of the Court entered September 5, 1950, overruling and denying plaintiff's motion for a new trial.

Verna Leib Sutton, *Plaintiff*.
By Howard R. Blalock,
Joseph R. Carson,
Jean S. Sheppard,
Her Attorneys.

Howard R. Blalock, *Attorney*
1404 S. Eleventh St.
Springfield, Illinois

Joseph R. Carson and
Jean S. Sheppard, *Attorneys*
102 E. Main Street
Urbana, Illinois

Indorsed: Filed Oct. 3, 1950. G. W. Schwaner, Clerk.

91 And afterwards, to wit: on the 3rd day of October, A. D. 1950, the following further proceedings were had in said court in said case and were entered of record, to wit:

Tuesday, October 3, 1950

Court met pursuant to adjournment.

Present, the Honorable Charles G. Briggle, Judge.
• • • (Caption—1134) • • •

It is ordered by the court that leave be and is hereby given the plaintiff in the above entitled case to file a bond for costs on appeal by October 16, 1950.

92 And afterwards, to wit: on the 16th day of October, A. D. 1950, there was filed in the office of the Clerk of said Court, a certain Bond for costs on appeal, which said Bond was and is in the words and figures, following, to wit:

93

Bond No. 35191.

Know All Men By These Presents, that we, Verna Leib Sutton, as Principal, and National Surety Corporation, as Surety, of the County of New York, State of New York, are held and firmly bound unto R. Wells Leib in the penal sum of Two Hundred Fifty and 00/100 (\$250.00) Dollars lawful money of the United States, for the payment of which well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly, severally and firmly by these presents.

Witness Our Hands and Seals this 9th day of October, A. D. 1950.

The Condition of the Above Obligation Is Such, that whereas the said R. Wells Leib, did on the 21st day of August, 1950, in the United States District Court aforesaid, recover a Summary Judgment against the said Verna Leib Sutton for the costs of said action, and said Verna Leib Sutton has filed notice of and taken an appeal to the Circuit Court of Appeals of the United States for the Seventh Circuit.

Now, Therefore, if the said Verna Leib Sutton shall prosecute said appeal with effect and pay all costs rendered and to be rendered against her in case said appeal is dismissed or the Summary Judgment affirmed, or such costs as the said Appellate Court may award if the Summary Judgment is modified, then the above obligation to be void, otherwise to remain in full force and virtue.

Verna Leib Sutton, *Principal*

National Surety Corporation, *Surety*

By: R. Mac Lean, *Attorney-in-Fact*
And: Louise Chinat, *Attorney-in-Fact*

State of New York, { ss:
County of New York.

I, Frances A. Massey, a Notary Public in and for the County of New York, State of New York, hereby certify that Verna Leib Sutton, personally known to me to be the same person whose name subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that she signed, sealed and delivered said instrument as her free and voluntary act and deed, for the uses and purposes therein set forth.

Given under my hand and Notarial Seal this 9th day of October, A. D. 1950.

Frances A. Massey,
Notary Public.

94 State of New York, } ss.
County of New York.

On this 10th day of October 1950, before me personally appeared R. MacLean Attorney-in-Fact of National Surety Corporation with whom I am personally acquainted, and who, being by me duly sworn, says that he resides in the county of Baldwin, L. I., that he is Attorney-in-Fact of National Surety Corporation, the Corporation described in, and which executed the within instrument; that he knows the corporate seal of such Corporation, and the seal affixed to the within instrument is such corporate seal and that it was affixed by order of the Board of Directors of said Corporation, and that he signed said instrument as Attorney-in-Fact of said Corporation by like order. And said Attorney-in-Fact further stated that he is acquainted with Louise Chinat and knows him to be Attorney-in-Fact of said Corporation; that the signature of the said Louise Chinat subscribe to the said instrument is in the genuine handwriting of the said Louise Chinat and that the Superintendent of Insurance of the State of New York has, pursuant to Chapter 33 of the Laws of the State of New York for the year 1909 constituting Chapter 28 of the Consolidated Laws of the State of New York, known as the Insurance Law, as amended, issued to National Surety Corporation his certificate that said Corporation is qualified to become and be accepted as surety or guarantor on all bonds, undertakings, recognizances, guaranties and other obligations required or permitted by law; and that such certificate has not been revoked.

Frank H. Cipolla,

Notary Public in the State of New York,
No. 24-5699200

Qualified in Kings County

Certificates filed with Kings Co. Registrar
New York County Clk. and Registrar

Queens County Clk. and Registrar

Bronx County Clk. and Registrar

Richmond County, Nassau County and

Westchester County

Term expires March 30, 1952.

Financial Statement—December 31, 1949

Assets

Cash in Banks.....	\$ 3,325,711.91
Investments:	
Bonds of United States Government	\$15,452,595.88
All Other Bonds and Notes	8,093,949.07
Preferred Stocks.....	3,819,520.00
Common Stocks.....	10,098,495.00
	<hr/>
Capital Stock of National Surety Marine Insurance Corporation, a wholly owned subsidiary	2,039,514.70
Premiums in course of collection, not over 90 days due	2,349,072.04
Accrued Interest.....	104,878.70
Reinsurance and other Accounts Receivable	190,282.82
Home Office Building	475,000.00
	<hr/>
Total Admitted Assets.....	\$45,949,020.12
	<hr/>

Liabilities

Reserve for Losses and Loss Adjustment Expenses	\$ 7,376,365.75
Reserve for Unearned Premiums	13,577,641.49
Reserve for Commissions, Expenses and Taxes	1,895,894.70
Capital	\$ 7,500,000.00
Surplus	15,599,118.18
	<hr/>
Surplus to Policyholders.....	23,099,118.18
	<hr/>
Total	\$45,949,020.12
	<hr/>

Bonds carried at \$1,182,798.03 are deposited as required by law.

Copy of Resolution.

At meeting of the Executive Committee of National Surety Corporation held in the City of New York, State of New York, on the 2nd day of February, 1950, the following resolution was unanimously adopted:

Resolved, that Edward M. Brown, Albert L. Carr, Albert E. Comstock, Jr., P. R. Cummings, Lawrence J. Dacunto, Edward J. Haring, Harry A. Kearney, A. H. Kraus, Katherine McFadden, William L. McGinty, R. MacLean, J. C. Murphy, Walter Pratz, J. G. Schleimer, Robert W. Schmitt, Walter W. Shannon, A. P. Valenti, M. A. Verdrose, Edward W. Warnke, Joseph Whitehead, hereby designated the First Group; and Louise Chinat, Daniel Giordano, Irene Jones, Mary McCarthy, A. C. Tirella, hereby designated the Second Group, be and each of them is hereby appointed an Attorney-in-Fact of this Corporation, and empowered to sign, seal and execute, acknowledge and deliver in its name, place and stead, any and all bonds, recognizances, contracts of indemnity and other conditional or obligatory undertakings; but the Corporation shall be bound on any such instrument only when signed by two of the persons named in the First Group, or by one of those named in the First Group and one of those named in the Second Group, and when any such instrument is so signed and sealed with the seal of the Corporation, it shall bind the Corporation as fully and to the same extent as if it were signed by the President of the Corporation, sealed with its seal and attested by its Secretary, the Corporation hereby ratifying and confirming all the acts of said Attorneys-in-Fact done pursuant to the power and authority herein given.

I, J. R. Whitehead, Assistant Secretary of National Surety Corporation, have compared the foregoing Resolution with the original thereof, as recorded in the Minute Book of said Corporation and do hereby certify that the same is true and correct transcript thereof and of the whole of the said original Resolution, that the same has not since been revoked and that the parties signing the attached instrument are still Attorneys-in-Fact of National Surety Corporation, and that the foregoing is a full, true and correct statement of the financial condition of said Corporation on the 31st day of December, 1949.

J. R. Whitehead,
Assistant Secretary.

(Seal)

Bond on Appeal.

Subscribed and sworn to before me this 10th day of October, 1950.

Frank H. Cipolla,
Notary Public in the State of New York,
No. 24-5699200.

Qualified in Kings County
Certificates filed with Kings Co. Registrar
New York County Clk. and Registrar
Queens County Clk. and Registrar
Bronx County Clk. and Registrar
Richmond County, Nassau County and
Westchester County

Term expires March 30, 1952.

Indorsed: Filed Oct. 16, 1950, G. W. Schwaner, Clerk.

95 And afterwards, to wit: on the 27th day of October, A. D. 1950, there was filed in the office of the Clerk of said Court, a certain Designation of Contents of Record on Appeal, which said Designation together with proof of service thereof was and is in the words and figures, following, to wit:

96 IN THE UNITED STATES DISTRICT COURT.

• • (Caption—1134) • •

PROOF OF SERVICE.

Howard R. Blalock, being first duly sworn on oath deposes and says that on Friday, October 27, 1950, he mailed a complete copy of the within attached Designation of Contents of Record on Appeal, in the above entitled case to A. M. Fitzgerald, whose address is 504 East Monroe Street, Springfield, Illinois, properly addressed to him at that address, with the required and sufficient amount of United States Postage, first class, placed upon the envelope containing said Designation, and deposited in the United States mail at Springfield, Illinois.

Howard R. Blalock.

Subscribed and Sworn to before me this 27th day of October, A. D. 1950.

(Seal)

G. W. Schwaner,
Clerk, U. S. Dist. Court.

THE UNITED STATES DISTRICT COURT.
(Caption—1134)

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL.

The Clerk of the United States District Court for the Southern District of Illinois, Southern Division, is hereby directed to make up a complete authenticated transcript of the record in the above entitled cause, said transcript to be made up so that it will contain the following documents and matters.

1. Process and return thereof.
2. Complaint.
3. Motion to Dismiss.
4. Reply to Motion to Dismiss with accompanying affidavits.
5. Brief of the Plaintiff on issues raised by Defendant's Motion to Dismiss, Affidavit accompanying it, and Counter-affidavit of Plaintiff.
6. Opinion of trial court.
7. Judgment of trial court.
8. Motion by Plaintiff for New Trial.
9. Suggestions in Objection to Motion by Plaintiff for New Trial.
10. Order on Motion of Plaintiff for a New Trial.
11. Notice of Appeal with date of filing and proof of service.
12. Bond for costs on Appeal.
13. Certificate of the clerk that such is the full and complete transcript of the record of the above entitled cause.

Verna Leib Sutton,
Plaintiff,
By Howard R. Blalock,
Joseph R. Carson,
Jean S. Sheppard,
Her Attorneys.

Howard R. Blalock, Attorney,
1404 S. Eleventh Street,
Springfield, Illinois,

Joseph R. Carson and
Jean S. Sheppard, Attorneys,
102 E. Main Street,
Urbana, Illinois.

Indorsed: Filed Oct. 27, 1950. G. W. Schwaner, Clerk.

98 And afterwards, to wit: on the 6th day of November, A. D. 1950, there was filed in the office of the Clerk of said court, a certain Appellee's Designation of Matters to be included in Record on Appeal, which said Designation together with Proof of Service thereof was and is in the words and figures, following, to wit:

99 THE UNITED STATES DISTRICT COURT.

(Caption—1134) *

APPELLEE'S DESIGNATION OF MATTERS TO BE INCLUDED IN RECORD ON APPEAL.

The Clerk of the United States District Court, for the Southern District of Illinois, Southern Division, is hereby requested to include in the authenticated transcript of record in the above cause the following matters additional to the contents designated by the Appellant:—

1. The amendment of the Motion to Dismiss by the addition of prayer for summary judgment.
2. All those matters mentioned in Rule 75, Par. (g) of the Federal Court Rules of Civil Procedure for District Courts, and particularly the following:
 - (a) The findings of fact and conclusions of law together with the direction of the entry of judgment thereon;
 - (b) All material pleadings without unnecessary duplication;
 - (c) The brief of the plaintiff on the issues herein was and is no part of the Clerk's record in this cause, but if such brief be included by the Clerk, there should also be included any and all briefs filed by the defendant pertaining to said issues.

R. Wells Leib,
By A. M. Fitzgerald,
His Attorney.

A. M. Fitzgerald,
Attorney for Defendant,
504 East Monroe Street,
Springfield, Illinois.

100

Proof of Service.

Walter T. Day, being first sworn, deposes and states that on Monday, November 6, A. D. 1950, he mailed a complete copy of the foregoing Appellee's Designation of Matters to be Included in Record on Appeal to Howard R. Blalock, Attorney, 1404 South 11th Street, Springfield, Illinois, and to Joseph R. Carson and Jean S. Sheppard, Attorneys, 102 E. Main Street, Urbana, Illinois, both respectively properly addressed, with sufficient postage attached thereto, for transmittal to said respective addresses, and deposited the same in the United States Mail at Springfield, Illinois, in the Post Office and that there is daily transmission of mails from said Post Office to the offices of said addressees.

Walter T. Day.

Subscribed and Sworn to before me this 6th day of November, A. D. 1950.

(Notarial Seal)

Wm. F. Fuiten,
Notary Public.

Indorsed, Filed November 6, 1950. G. W. Schwaner,
Clerk.

101 United States of America, }
Southern District of Illinois, } ss.
Southern Division.

I, G. W. Schwaner, Clerk of the United States District Court in and for the Southern District of Illinois, do hereby certify that the annexed and foregoing is a true and full transcript of the proceedings had of record and on file, made in accordance with Appellant's and Appellee's Designations of Contents of Record on Appeal, in the case of Verna Leib Sutton vs. R. Wells Leib, Civil Action No. 1134, as fully as the same appears from the original files and records in said cause now in my office remaining.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Springfield this 9th day of November, A. D. 1950.

(Seal)

G. W. Schwaner,
Clerk.

[fols. 79-80] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 81] [Caption omitted]

[fols. 82-85] Appearances of Counsel—(Omitted in Printing)

[fol. 86] Argument and Submission—(Omitted in Printing)

[fol. 87] IN THE UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT

VERNA LEIB SUTTON, Plaintiff-Appellant,

vs.

R. WELLS LEIB, Defendant-Appellee

Appeal from the United States District Court for the
Southern District of Illinois, Southern Division

OPINION—April 26, 1951

Before Major, Chief Judge, and Kerner and Finnegan,
Circuit Judges

KERNER, Circuit Judge:

This appeal presents another aspect of the problem of migratory divorce. Plaintiff sued defendant, her first husband, for 40 alimony installments from August 1, 1944 to November 1, 1947, inclusive, alleged to be due under a divorce decree. Defendant denied the claim on the ground that his liability under the decree had been terminated by her remarriage on July 3, 1944. Her third marriage was to one Sherwood Sutton on November 21, 1947. The court rendered summary judgment in favor of defendant on his motion therefor, and the appeal is from that judgment.

The facts out of which the controversy arose are undisputed. Plaintiff obtained a decree of divorce from defendant in 1939 in an Illinois court. The decree provided for the payment of \$125 "on or before the first day of each calendar month . . . for so long as the plaintiff shall

remain unmarried, or for so long as this decree remains in full force and effect After obtaining her divorce plaintiff moved to New York.

On July 3, 1944, plaintiff married Walter Henzel in Reno, [fol. 88] Nevada. Henzel had on that day obtained a decree of divorce in a Nevada court from Dorothy Henzel, a New York resident. She had been served only by publication and did not appear. Immediately following the divorce and remarriage plaintiff and Henzel returned to New York. On August 3, 1944, Dorothy Henzel instituted a separate maintenance proceeding against Walter in a New York court and this proceeding resulted in a decree in her favor, awarding separate maintenance and declaring the Nevada divorce null and void. Plaintiff had ceased living with Henzel immediately after service of summons in Dorothy Henzel's suit against him, and in January, 1945, she filed suit against him for annulment of their marriage. On June 6, 1947 the New York court entered an interlocutory decree which became final three months later, declaring the nullity of the marriage of plaintiff and Henzel on the ground that he had another wife living at the time of the marriage.

Defendant had made all the alimony payments due under the Illinois decree to and including that due on May 1, 1944. After the Nevada marriage some correspondence ensued between New York counsel for plaintiff and defendant's counsel relative to further payments. Defendant claimed a credit on account of some advances previously made to plaintiff. The matter was settled by the remittance of \$180 in full on the payments due June 1 and July 1. In acknowledging the receipt of this amount by letter of September 8, 1944, plaintiff's counsel stated, "This remittance satisfies in full the alimony claim of the former Mrs. Leib." Plaintiff was remarried in November, 1947.

In rendering judgment for defendant the court held that it was unnecessary to determine which of the two conflicting judgments was entitled to the full faith and credit guaranteed by the Constitution of the United States, in view of the fact that the parties had entered into a contract settling the question of accrued alimony at a time when both treated the Nevada decree as valid and in full force and effect, and that no reason appeared why the settlement and

release then effected should not be held to constitute a binding obligation upon each.

We cannot agree with the reasoning of the court that acknowledgment of the remittance of the balance due on the June and July payments with the statement that it satisfied in full the alimony claim of the former Mrs. Leib operated of itself to bar any further claims on her part. [fol. 89] It covered an amount admittedly due on past installments—since the divorce decree required that payments be made on the first of each month, her marriage on July 3 would not entitle defendant to an apportionment of the amount for that month, and since the amount claimed by him to have been advanced to her was credited on the \$250 due for the two months, there could not be said to be any compromise of a disputed claim. Acceptance of the amounts admittedly past due could not operate to extinguish any future liability arising under the decree. *San Fillipo v. San Fillipo*, 340 Ill. App. 353. We think this is true even though it appears of record that all but one of the series of nine letters between counsel relative to the June and July payments were written after plaintiff had knowledge of the pending separate maintenance action and had ceased living with Henzel.

There remains the question as to the effect of the Nevada remarriage on defendant's obligation to pay alimony to plaintiff "for so long as (she) shall remain unmarried The answer to this, we believe, turns on the validity of the marriage in Nevada, where it was performed, rather than in New York, where it was annulled. Section 121 of the Restatement, Conflict of Laws, relating to the law governing the validity of marriage, states the rule, "Except as stated in §§ 131 and 132 [which we deem inapplicable here], a marriage is valid everywhere if the requirements of the marriage law of the state where the contract of marriage takes place are complied with." See also *Peirce v. Peirce*, 379 Ill. 185. And of course the validity of the Nevada remarriage turns on the validity in Nevada of the antecedent Nevada divorce of Henzel from his New York wife.

We have searched the numerous cases decided by the Supreme Court of the United States on the subject of migratory divorce for a definitive holding as to the judicial

status of such divorce in the state that decreed it. It appears to be assumed that the decree is valid and binding in the state where it is rendered. Thus, Mr. Justice Frankfurter remarks in his concurring opinion, *Williams v. North Carolina I*, 317 U. S. 287, 307, "It is indisputable that Nevada's decrees here, like the Connecticut decree in the *Haddock* case, were valid and binding in the state where they were rendered." And Mr. Justice Murphy, concurring in *Williams II*, 325 U. S. 226, 239, states that "The State of Nevada has unquestioned authority, consistent [fol. 90] with due process, to grant divorces on whatever basis it sees fit, to all who meet its statutory requirements. It is entitled, moreover, to give to its divorce decrees absolute and binding finality within the confines of its borders." And Mr. Justice Rutledge, dissenting in the same case, at page 244, comments on the fact that the Nevada judgment was not voided by the decision. "It could not be, if the same test applies to sustain it as upholds the North Carolina convictions. It stands, with the marriages founded upon it, unimpeached." He and Mr. Justice Black, also dissenting, both call attention to the fact that the Court, in its decision, does not hold that the Nevada judgment is invalid in Nevada. Hence, in spite of the absence of a clear-cut statement in any of the main opinions of the Court as to the status of the Nevada decree in Nevada after a successful extraterritorial challenge of it, we think we may spell out authority for our assumption that it survives such challenge and remains in full force and effect within the confines of the state of Nevada until and unless it is set aside upon review in that state.

Assuming the validity of the divorce in Nevada, then the party or parties thereto resumed full marital capacity in that state. It follows that, so far as the state of Nevada is concerned, there was no inhibition against the remarriage of Walter Henzel in that state, and no reason appears for challenging his marriage there to plaintiff immediately after the decree of divorce was rendered. Under the terms of the Illinois decree of divorce of plaintiff and defendant, such marriage immediately terminated the obligation of the latter to continue the alimony payments required thereby. We think that obligation was not reinstated and

revived by the subsequent annulment of the Nevada marriage in New York.

Judgment affirmed.

[fols. 91-92] UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT

Before Hon. J. Earl Major, Chief Judge; Hon. Otto Kerner,
Circuit Judge; Hon. Philip J. Finnegan, Circuit Judge

10294

VERNA LEIB SUTTON, Plaintiff-Appellant,

vs.

R. WELLS LEIB, Defendant-Appellee

Appeal from the United States District Court for the
Southern District of Illinois, Southern Division

JUDGMENT—April 26, 1951

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Illinois, Southern Division; and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, with costs.

[fols. 93-114] Petition for Rehearing covering 15 pages filed May 8, 1951, omitted from this print. It was denied, and nothing more by order of May 22, 1951.

[fols. 115-130] Answer of Appellee to Petition for Rehearing of Appellant (omitted in printing).

[fol. 131] UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT

[Title omitted]

ORDER DENYING REHEARING—May 22, 1951

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, Denied.

[fols. 132-134] Motion for stay and order staying mandate (omitted in printing).

[fols. 135-136] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 137] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

No. 143

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed October 15, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(7953)